Petition

81-989

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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1981

DALLAS COUNTY, TEXAS, ET AL.,

Petitioners,

v.

CARL THOMAS,

v.

BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

I.

WHETHER IT WAS ERROR FOR THE COURT OF APPEALS TO AWARD ATTORNEY'S FEES AGAINST DALLAS COUNTY WITHOUT RAISING THE QUESTION BEFORE FINAL JUDGMENT OR GIVING NOTICE OF APPEAL FROM THE FINAL JUDGMENT.

II.

WHETHER IN A 42 U.S.C. § 1983 CASE JUDGMENT FOR ATTORNEY FEES MAY BE AWARDED AGAINST THE COUNTY WHEN IT IS NOT A PARTY AND THE SHERIFF IS NOT SUED IN HIS OFFICIAL CAPACITY.

III.

WHETHER IT WAS ERROR FOR THE COURT OF APPEALS NOT TO FOLLOW THE LAW OF THE CASE.

IV.

WHETHER THE COUNTY, IF INJURY IS NOT OTHERWISE CAUSED BY COUNTY/STATE POLICY, IS LIABLE FOR 42 U.S.C. § 1988 ATTORNEY'S FEE AWARD WHERE A TEXAS SHERIFF, WITH COMPLETE EMPLOYMENT PRACTICES AUTHORITY UNDER STATE LAW, VIOLATES DEPUTIES' RIGHTS UNDER 42 U.S.C. § 1983.

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CARL THOMAS,

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BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States

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[1]The Petitioners are Dallas County, County Judge Garry Weber, County Commissioner Jim Jackson, County Commissioner Nancy Judy, County Commissioner Jim Tyson, and County Commissioner Roy Orr, comprising the Commissioners Court of Dallas County, the governing body of Dallas County, Texas. The Respondent is Benny B. Barrett, a former deputy sheriff of Dallas County. Carl Thomas is the former Sheriff of Dallas County and was the only party to appeal the final judgment of the District Court filed May 31, 1979, to the Court of Appeals.

Court of Appeals for the Fifth Circuit, entered in the above cause on July 10, 1981, rehearing en banc denied September 1, 1981, and motion to reconsider denial of motion for rehearing en banc overruled October 2, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 649 F.2d 1193 (5th Cir. 1981). A copy of said opinion is included in Appendix A. A copy of the Fifth Circuit's order denying rehearing en banc, as well as the Fifth Circuit's order denying the motion to reconsider denial of motion for rehearing en banc, are also included in Appendix A.

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit, filed April 11, 1980, holding that "'Judgment was entered against the Sheriff alone. It expressly states that it 'draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment.' If execution on the judgment is levied on county funds, the County may then oppose it.", and affirming the District Court's order refusing Petitioners' application to intervene is included in Appendix B.

The order of the United States District Court for the Northern District of Texas, Dallas Division, filed September 6, 1979, clarifying the court's order of August 29, 1979, and holding that the plaintiff is at least entitled to a personal judgment against Carl Thomas, since it is clear under *Monroe v. Pape*, 365 U.S. 167 (1961), that an officer operating under color of state law in violation of 42 U.S.C. § 1983 is individually liable for the result of his conduct, but declining to consider liability of the County of Dallas because the

County of Dallas is not a party to the case although they sought to intervene, is included in Appendix C.

The order of the United States District Court for the Northern District of Texas, Dallas Division, filed August 29, 1979, denying plaintiff's motion to tax attorney fees and costs against county funds and for writ of execution and/or other necessary orders is included in Appendix D.

The judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed on May 31, 1979, is included in Appendix E.

The order of the United States District Court for the Northern District of Texas, Dallas Division, filed March 29, 1979, denying Petitioners' request for intervention in the *Barrett* suit is included in Appendix F.

The order of the United States District Court for the Northern District of Texas, Dallas Division, filed August 29, 1980, in Civil Action No. CA 79-1032-F, styled Bobby Joe Smith, et al., v. Carl Thomas, et al., which granted defendant Dallas County's motion for summary judgment against Bobby Joe Smith, one of the members of the class in the original *Barrett* suit, is included in Appendix G.

The order of the United States District Court for the Northern District of Texas, Dallas Division, filed January 19, 1981, dismissing all federal claims of Bobby Joe Smith and Mrs. Smith against Dallas County, et al., with prejudice is included in Appendix H.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit

on July 10, 1981, and Petitioners' Motion for Rehearing En Banc was denied September 1, 1981. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1983
42 U.S.C. §1988
Article 6869, V.A.T.S.
Article 1573, V.A.T.S.
Texas Constitution, Art. V, Sec. 18
Rule 10(a), Federal Rules of Civil Procedure.
Rule 50(b), Federal Rules of Civil Procedure.
Rule 52(b), Federal Rules of Civil Procedure.
Rule 59, Federal Rules of Civil Procedure.
Rule 59(e), Federal Rules of Civil Procedure.
Rule 4(4), Federal Rules of Appellate Procedure.

These statutes, rules and constitutional provisions are set forth in Appendix I.

STATEMENT OF THE CASE

The Original Complaint in this case was filed by Benny B. Barrett, Respondent, on November 14, 1977, and was never amended. The suit was filed prior to *Monell v. Dept. of Soc. Serv. of the City of New York*, 98 S.Ct. 2018, and at a time when even a municipality was held by the United States Supreme Court in *Monroe v. Pape*, 81 S.Ct. 473, not to be a person under 42 U.S.C. §1983. The suit was not filed against Dallas County as a defendant but only against

"Carl Thomas, Sheriff" under 42 U.S.C. §1983 of the Civil Rights Act. The case was filed in the United States District Court for the Northern District of Texas, Dallas Division, claiming that Carl Thomas fired Barrett and members of his class for political reasons. Respondent not only did not sue Petitioners (Dallas County and the Commissioners Court) in the civil rights case, he successfully opposed their intervention in the suit he had filed against Thomas, even though Texas law provides that a Texas county is not responsible to pay a judgment unless the county is a party. The district court's order denying intervention is included in Appendix F, and the Court of Appeals decision affirming same and holding that the judgment was entered against the Sheriff alone is included in Appendix B. Although suit was filed prior to *Monell*, supra, judgment was not entered until approximately one year after *Monell*.

After the denial of the intervention, the District Court proceeded to enter a judgment in favor of the plaintiff and members of the class against Carl Thomas on May 31, 1979. (Appendix E). Carl Thomas filed a motion for new trial. Respondent Barrett did not. Carl Thomas' motion for new trial was overruled by order dated June 25, 1979, (Appendix J). On July 24, 1979, Thomas gave notice of appeal from the order denying Defendant's Motion for New Trial. Although the final judgment dated May 31, 1979, awarded attorney fees against Thomas but not against Dallas County, Respondent Barrett never gave notice of appeal from that judgment. The judgment became final and binding on Barrett, subject to Thomas' appeal. As is mentioned hereinafter, Barrett did appeal from later orders of the court overruling subsequent motions.

On July 11, 1979, forty-one (41) days after the final judgment of May 31, 1979, was entered, and at a time when

Dallas County had been excluded as a party to the suit, the Respondent filed a motion requesting the District Court to "tax attorney fees and costs against County funds and for a writ of execution." This motion was denied by the District Court on August 29, 1979,

> "... because the County sought to intervene in this case and the plaintiff actively opposed the County's intervention. The County could have been permitted to intervene for the simple purpose of contesting attorney fees, but after reviewing plaintiff's opposition, I determined that I would not permit the County to intervene and that the question of whether or not the County was liable for Carl Thomas' attorney fees would not be passed upon in this case. I decline to do so at this time..." (Appendix D).

On September 6, 1979, the Court entered an order "Clarifying the Court's Order of August 29, 1979", but the terms of the May 31, 1979, final Judgment were never changed.

The Respondent filed a notice of appeal on September 6, 1979, from the Court's Order dated August 29, 1979. On September 12, 1979, Respondent Barrett filed an amended notice of appeal from Orders entered August 29, 1979, and September 6, 1979. Both Barrett notices of appeal are included in Appendix K.

The appeal to the Court of Appeals for the Fifth Circuit was perfected by Thomas.

Respondent Barrett filed in answer thereto "Brief of Appellee." Barrett did not purport to file a cross-appeal, although his Point IV in Appellee's Brief did state as follows:

> "IV. The Trial Court properly granted Plaintiff and the Class Attorneys' fees in this case under 42 U.S.C.

> §1988, and the amount was reasonable, although the trial court erred in holding that such fees were not recoverable against the Commissioners Court and the County of Dallas. Further, any issue about the propriety of the attorneys' fee award was waived by the Appellant by failure to raise it in the trial court."

Pages 5 and 6 of Appellee's Brief which so reflect, as well as the last four pages of his Brief which restates Point IV, makes argument thereunder, and states the conclusion are included in Appendix L. Barrett, being aware that he had not brought suit against the County (but unaware of the action the Court of Appeals would later take to hold the attorney's fee award should be against the County), filed suit in the United States District Court for the Northern District of Texas, No. CA 3-80-0886-D, attempting to enforce the current judgment against the County. Barrett's attorney acknowledged to the Court of Appeals, by letter dated November 10, 1980, that he had asked for attorney's fees in the new case. The letter is included in Appendix N.

Under this state of the record, the Court of Appeals affirmed in part, vacated in part and rendered in part "holding Dallas County jointly and severally liable for the Section 1988 attorney fees awarded plaintiff's counsel in this action." (Appendix A-5). After the Court of Appeals entered that decision, these Petitioners filed a motion for rehearing en banc and same was denied by order dated September 1, 1981. (Appendix A-23).

In his Original Complaint the plaintiff claimed federal jurisdiction pursuant to 28 U.S.C. §1331 and §1343, as authorized by 42 U.S.C. §1983. Plaintiff also invoked jurisdiction pursuant to 28 U.S.C. §2201 and §2202.

REASONS FOR GRANTING WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for the Fifth Circuit because:

1. The Court of Appeals' action in reversing and rendering the District Court judgment as to attorney's fees is contrary to the Federal Rules of Appellate Procedure, the decisions of the Circuit Courts and the Supreme Court of the United States where there was no timely notice of appeal.

2. Where 42 U.S.C. §1983 suit is not brought against the Sheriff in his official capacity, and County is not a party, no judgment can be entered against the County.

3. The failure of the Court of Appeals to follow the law of the case as established by the District Court and the Court of Appeals in a prior appeal is contrary to the prior decisions of the Court of Appeals for the Fifth Circuit and other Courts of Appeals.

4. A Texas county (being a State agency with Eleventh Amendment immunity) cannot be held liable for attorney fees under 42 U.S.C. §1988, where the alleged unconstitutional actions in a 42 U.S.C. §1983 case, not involving a policy of the Commissioners Court, resulted from the alleged commission of a constitutional tort by one whose edicts and acts do not constitute policy of the State or County but, even if State policy was involved, the citizens of a particular county should not bear singular responsibility for same.

I. THE COURT OF APPEALS' ACTION IN REVERSING AND RENDERING THE DISTRICT COURT JUDGMENT AS TO ATTORNEY'S FEES IS CONTRARY TO

THE FEDERAL RULES OF APPELLATE PROCEDURE, THE DECISIONS OF THE CIRCUIT COURTS AND THE SUPREME COURT OF THE UNITED STATES WHERE THERE WAS NO TIMELY NOTICE OF APPEAL.

Since the Court of Appeals case only involved an appeal from the May 31, 1979, judgment by Carl Thomas, and if the Respondent's actions did not qualify as a motion under Rule 50(b), 52(b) or Rule 59, and the notice of appeal by Respondent was not timely, then the two notices of appeal given by Respondent from the August 29, 1979, and September 6, 1979, orders are separate appeals and are not sufficient or timely to question the final judgment of May 31, 1979.

Although the Court of Appeals' opinion states that "The plaintiff's cross-appeal the trial court's determination that Dallas County is not liable for the attorney's fees award", a careful examination of the record reveals that it is a gratuitous and benevolent statement by the Court of Appeals without justification in the record. The Respondent did not purport to file cross-points in the case at bar and did not even designate himself as a Cross-Appellant, although the Court of Appeals did erroneously so designate him in both the caption of the case and the opinion. The designation was erroneous because of the failure to give notice of appeal from the final judgment and the other notices of appeal were not timely as to the May 31, 1979, judgment.

Although the Court of Appeals said the County's interest was represented, the County was not a party and the County had no one to check the record and point out these shortcomings to the Court. It was not to Carl Thomas' best interest for his attorney (the District Attorney) to do so

since such action could have constituted a conflict of interest.

The final judgment in this case was signed May 30, 1979, and filed May 31, 1979. (Appendix E). That judgment made award of damages, injunctive relief and attorney fees. Respondent never gave notice of appeal from that judgment. He did give notice of appeal from the Court's order filed August 29, 1979, denying plaintiff's motion to tax attorney fees and costs against County funds and for a writ of execution and/or other necessary orders. (Appendix D). He also appealed from another order of the Court dated September 6, 1979, clarifying the Court's order of August 29, 1979. Appeals have to be taken from final judgments, not from judicial rationales. *Cook v. Hirschberg*, 258 F.2d 56, at 57.

The Federal Rules of Appellate Procedure, Rule 4(4), provides that the time for filing a notice of appeal can be tolled by the timely filing of four motions. The four motions are: (1) a motion for judgment under Rule 50(b); (2) a motion under Rule 52(b) to amend or make additional findings of fact; (3) a motion under Rule 59(e) to alter or amend the judgment; and (4) a motion for new trial under Rule 59. The time for appeal shall run from the entry of the order denying a new trial or granting or denying any such other motion. Fed. R. Appellate Pro. 4(4). Defendant Thomas filed a motion for new trial on June 11, 1979. That motion was denied by an order entered on June 25, 1979. Defendant Thomas filed a timely notice of appeal within thirty days from this order on July 24, 1979. Plaintiff (Respondent)[1] failed to file a notice of appeal within the

[1]Respondent Barrett is sometimes referred to as plaintiff herein.

requisite time, even when extending that time to fourteen days after the defendant's filing of his notice.

The motion plaintiff filed on July 11, 1979, was clearly not within one of the four categories outlined above that would toll the time for filing a notice of appeal. Even if it could be argued that the motion plaintiff filed on July 11, 1979, *was* within one of these four categories, it was not filed within ten days from the date of the judgment as mandated by the Rules, Fed. R. Civil Pro. 50(b), 52(b), and 59. In fact, the motion was not even filed within ten days of the order denying defendant's motion for a new trial. In order for the motion to toll the time for filing notice of appeal, the motion itself must be timely filed. *Albers v. Gant*, 435 F.2d 146, 147 (5th Cir. 1970).

Assuming arguendo that the motion filed on July 11, 1979, and the orders overruling that motion were appealable orders, then plaintiff appealed only from these two orders, not from the judgment entered on May 31, 1979. Because plaintiff limited his appeal to these two orders, and failed to perfect an appeal from the final judgment, he cannot later attack that judgment as appellee.

> "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt

with below.' Ibid. The rule is inveterate and certain." *Morley Construction Co., et al. v. Maryland Casualty Co.*, 300 U.S. 185 at 191 (1937).

Neither the Respondent in this case nor the Court of Appeals is entitled to enlarge the judgment as they seek to do since Respondent did not give a notice of appeal. The decisions in this regard are many and consistent. See *When to Cross-Appeal and Cross-Petition — Certainty or Confusion*, 87 Harvard Law Review 763. As pointed out hereinbefore, there was no notice of appeal from the final judgment of May 31, 1979, and, therefore, the Respondent was not entitled to file a cross-point. Under these circumstances, it was clearly erroneous for the Court of Appeals to reverse and render attorney fees against Dallas County.

II. WHERE 42 U.S.C. § 1983 SUIT IS NOT BROUGHT AGAINST THE SHERIFF IN HIS OFFICIAL CAPACITY AND COUNTY IS NOT A PARTY, NO JUDGMENT CAN BE ENTERED AGAINST THE COUNTY.

This suit was *not* brought against Carl Thomas, Sheriff, in his official capacity, but only against "Carl Thomas, Sheriff". Dallas County was not a party to the suit although it unsuccessfully tried to intervene.[3] The suit was filed prior to both the decision in *Monell*, supra, as well as *Hutto v. Finney*, 98 S.Ct. 2565 (1978), rehearing denied 99 S.Ct. 1035, and the plaintiff never amended his complaint.

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[3]No. 79-2183, Benny B. Barrett, Plaintiff-Appellee, versus Carl Thomas, Sheriff, Dependant-Appellee, County Judge Garry Weber, et al., Movants-Appellants. (Appendix B).

Respondent was not required to sue Carl Thomas in his official capacity. Indeed, it is not necessary to sue one in his official capacity for the purposes of the statutory requirement that a §1983 defendant act "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory."

> "That requirement is addressed to the source of authority for defendant's conduct, and, so long as the state clothed the defendant with apparent authority to act, the requirement has been met." *Kedra v. City of Philadelphia*, 454 F.Supp. 652, 664 (E.D. Pa. 1978).

If the Respondent wanted to collect the judgment or some part thereof from the funds of Dallas County, he could have included Dallas County and the members of the Commissioners Court as defendants, but declined to do so. Rule 10(a) F.R.C.P., specifically requires the naming of all parties in the caption. *Kedra v. City of Philadelphia*, 454 F.Supp. 652 (E.D.Pa. 1978); *Corrigan v. California State Legislature*, 263 F.2d 560, 567 (9th Cir.), cert. denied, 359 U.S. 980, 79 S.Ct. 901, 3 L.Ed.2d 929 (1959). Even if the suit had been against Carl Thomas in his official capacity, ". . . if the official has acted outside his authority, he was not acting 'officially' and, therefore, only can be held personally liable for his conduct." *Kedra v. City of Philadelphia*, supra, at 664. Liability against local government may not be based on respondeat superior. *Monell*, supra. Neither the County, the members of the Commissioners Court nor any person in the "official capacity" was named in the caption. When a party seeks by lawsuit to obtain funds from a governmental treasury, that governmental entity is an indispensable

party since it is the governmental entity that has the interest in its funds. See *Mine Safety Appliances Co. v. Forestall*, 326 U.S. 371, 66 S.Ct. 219 (1945); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 65 S.Ct. 347 (1945). Local governmental entities must also be joined if a party seeks to make a claim against that entity's funds. See *7 Wright and Miller*, FEDERAL PRACTICES AND PROCEDURE, Sec. 1617. This rule is in accord with Texas law. The Texas Supreme Court has held that suits affecting county funds must be brought against the county. *Scott v. Graham*, 292 S.W.2d 324 (Tex. 1956). This rule applies whenever the judgment would expend itself on the public treasury. Rule 17(b), Fed.R.Civ.Pro., provides, in part, that:

> "Capacity to Sue or be Sued.
>
> ..... In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held ....."
>
> "The third sentence of Rule 17(b), which directs that capacity be determined by the law of the State in which the district Court is held except as otherwise prescribed in this rule, applies to non-federal public officials. This portion of the rule preserves pre-1938 federal practice regarding the capacity of state officers ... [T]he case 'involves the relations between the states themselves, with which Courts are incompetent to deal, and which are intrusted to other authorities." *Wright and Miller*, FEDERAL PRACTICE AND PROCEDURE, Section 1566 at 761.

When reference is made to Texas law concerning the capacities in which a county may be sued, Rule 33 of the Texas Rules of Civil Procedure provides,

> "Suits by or against a county or incorporated city, town or village shall be in its corporate name."

If one seeks "back-pay" from the funds of a governmental entity, that entity itself is an indispensable party. *Zapata v. Smith*, 437 F.2d 1024 (5th Cir. 1971); *White v. Bloomberg*, 345 F.Supp. 133 (D. Md. 1972), affirmed 501 F.2d 1379 (4th Cir. 1974). If the purpose of a suit is to hold the county liable or in any way affect its interest, the county is a necessary party and must be joined. 15 Tex.Jur.2d, Joinder of Parties, Sec. 168. Official capacity suits have been said to be "only another way of pleading an action against an entity of which an officer is an agent . . ." *Monell v. Dept. of Soc. Serv.*, supra, note 55 at p. 2036.

Barrett's Complaint did not allege that the Commissioners Court or Dallas County had any policy or custom which would permit Sheriff Thomas, or anyone else, to transfer, demote or terminate an employee due to the employee's political affiliations. Neither did Barrett allege in his Complaint that the Sheriff was a person whose edicts or acts constituted either official policy of the State of Texas or Dallas County. Since there was no such allegation, it is understandable that neither the jury nor the court found same to exist. Under these circumstances, it was error for the Court of Appeals to hold that the district court abused its discretion by not so finding when such question was not before the Court of Appeals.

The Respondent has acknowledged that it did not plead or litigate issues against the County. On page 19 of its Brief

in the Intervention Appeal to the Court of Appeals for the Fifth Circuit, Cause No. 79-2183, Benny B. Barrett, Plaintiff-Appellee v. Carl Thomas, Sheriff, Defendant-Appellee, Garry Weber, et. al., Movants-Appellants, stated that:

> ". . . . the District Court did not enter an order, final or otherwise, deciding the County's liability under the judgment. In the absence of such an order, there is nothing to give the Court of Appeals jurisdiction. (See Trial Court's Judgment of May 30, 1979, p. 5, and Order of August 29, 1979). This conclusion would follow even if Appellants had been allowed to intervene. Even a party could not appeal from a non-determination, particularly one of which had not been pleaded or litigated."

The said page 19 of said Brief is included in Appendix M. Even if Carl Thomas was acting in his official capacity, that does not keep him from being liable for attorney fees where he fails to establish a good faith defense. *Francia v. White*, 594 F.2d 778 (10th Cir. 1979). Likewise, even if it was alleged and proved that Carl Thomas was acting in his official capacity in violating the civil rights of the deputies, that still would not make the State or County liable for attorney fees in the absence of the plaintiff's pleading and proving that he was acting in accordance with a policy, statute or usage of the government or that he was an officer whose edicts constituted policy. As pointed out hereinabove, no such allegations were either made or proved and the Court of Appeals erred in so holding. The policy of Dallas County is set by the Commissioners Court in accordance with Art. 5, Sec. 18, of the Texas Constitution. Texas being a State with 254 counties and a like number of county sheriffs, it has never been argued in any reported case that

the sheriff is a high state official whose acts and edicts constitute state policy.

III. THE FAILURE OF THE COURT OF APPEALS TO FOLLOW THE LAW OF THE CASE AS ESTABLISHED BY THE DISTRICT COURT AND THE COURT OF APPEALS IN A PRIOR APPEAL IS CONTRARY TO THE PRIOR DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND OTHER COURTS OF APPEALS.

The district court's decision in this case and the decision of the Court of Appeals for the Fifth Circuit filed April 11, 1980, holding that:

> "Judgment was entered against the Sheriff alone. It expressly states it 'draws no conclusion concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment . . . .'"

(Appendix B) constitute the law of the case. Since there has been no changed facts and there has been no intervening decision of the United States Supreme Court, it was error for the United States Court of Appeals for the Fifth Circuit not to follow the law of the case so established. The law of the case was further established in the case of *Bobby Joe Smith, et al. v. Carl Thomas, et al.* in the United States District Court for the Northern District of Texas, Dallas Division, Civil Action No. CA3-79-1032-F, where Bobby Joe Smith, one of the members of the class who received an award in the *Barrett* case, filed suit against Carl Thomas, members of the Commissioners Court and the County of Dallas under 42 U.S.C. § 1981, § 1983, § 1985 and the First,

Fifth, and Fourteenth Amendments to the United States Constitution. On August 29, 1980, the Court entered its order granting a Motion for Summary Judgment for the defendants unless the plaintiff later amends and states a federal cause of action. The plaintiff did amend but, by order filed on the 19th day of January, 1981, the Court granted the Summary Judgment and dismissed the federal claims with prejudice because the plaintiff had failed to state a cause of action. Plaintiff's Complaint in that case, as well as both of the aforementioned judgments, are included in Appendix G. There was no appeal. The dismissal is now final and not only constitutes the law of the case but also constitutes collateral estoppel to the other members of the class, as well as to Bobby Joe Smith. *Allen v. McCurry*, 449 U.S. 90, 101 St.Ct. 411 (1980).

The general rule is that the court on a second appeal is bound by "the law of the case" where the state law has not been changed and the Supreme Court has not made a decision in the meantime which would have a bearing on the case. *Zichy v. City of Philadelphia*, 590 F.2d 503 (3rd Cir. 1979).

> "We have considered appellant's numerous other challenges to the default judgment and find them to be without merit. Under the doctrine of 'law of the case', our ruling as to appellant's other claims is binding on all subsequent proceedings at both the district and appellate court levels."

United Artists Corporation v. Freeman, 605 F.2d 854, note 5 at 857 (1979). Cases holding to the same effect are *General Committee of Adjustment v. Burlington Northern, Inc.*, 620

F.2d 161 (8th Cir. 1980), cert. den. 101 S.Ct. 88; *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344 (D.C. Cir. 1977); *Chicago & Northwestern Transportation Co. v. United States of America*, 574 F.2d 926 (7th Cir. 1978); *Schwartz v. N.M.S. Industries, Inc.*, 575 F.2d 553 (1978); and *De Tenorio v. Lightsey*, 589 F.2d 911 (5th Cir. 1979), cert.den. 100 S.Ct.59. It was clearly erroneous for the Court of Appeals not to follow the law of the case as it had been decided by the District Court and the Circuit Court on the first appeal.

IV. A TEXAS COUNTY (BEING A STATE AGENCY WITH ELEVENTH AMENDMENT IMMUNITY) CANNOT BE HELD LIABLE FOR ATTORNEY FEES UNDER 42 U.S.C. § 1988, WHERE THE ALLEGED UNCONSTITUTIONAL ACTIONS IN A 42 U.S.C. § 1983 CASE, NOT INVOLVING A POLICY OF THE COMMISSIONERS COURT, RESULTED FROM THE ALLEGED COMMISSION OF A CONSTITUTIONAL TORT BY ONE WHOSE EDICTS AND ACTS DO NOT CONSTITUTE POLICY OF THE STATE OR COUNTY BUT, EVEN IF STATE POLICY WAS INVOLVED, THE CITIZENS OF A PARTICULAR COUNTY SHOULD NOT BEAR SINGULAR RESPONSIBILITY FOR SAME.

(1) COUNTY IS STATE AGENCY ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

A Texas county is legally and constitutionally an agency of the State and may differ from the nature of counties in other states. The Supreme Court of Texas has held that Texas counties are created "for the exercise of essentially

State powers as distinguished from municipal powers; and, with their conferred powers having the nature of duties rather than privileges, existing as but agencies of the State for the effective discharge through local officers of the governmental obligations of the State. The use of the counties of the State as a means of government is a use by the State and for the State as a sovereignity." *Bexar County v. Linden*, 220 S.W. 761 (Tex. 1920). As was pointed out by the Court in *Bexar County*, supra, counties are to be distinguished from municipal corporations in Texas. The Court of Appeals for the Fifth Circuit en banc has recently withheld ruling on the question of Eleventh Amendment immunity for a county and remanded same to the trial court for further consideration because the trial court did not deal with the question that Texas counties ". . . unlike counties in most states and unlike municipalities in Texas . . . " are agencies or departments of the State. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981), at page 306. Because a Texas county, as an integral part of the State, is endowed with sovereignty entitling it to immunity under the Eleventh Amendment to the United States Constitution, it has been held in *Doe v. Sullivan*, 472 F.Supp. 975 (W.D. Tex. 1979), that counties in Texas could not properly be sued for monetary relief under 42 U.S.C. § 1983.

The United States Supreme Court held in *Quern v. Jordan*, 99 S.Ct. 1139 (1979), that agencies and departments of a state are not subject to suit under 42 U.S.C. § 1983. 99 S.Ct. at 1145. The United States Supreme Court further pointed out in *Monell v. Dept. of Soc. Serv.*, supra, 690 note 54, that municipalities, as was involved in that case, were

not governmental units which were considered part of the state for Eleventh Amendment purposes. Therefore, the city and city officials were named parties to the suit in *Monell*, supra. The County was not named a party in the suit at bar and neither was the Commissioners Court, the governing body. Even Carl Thomas was not sued in his official capacity. *Hutto v. Finney*, supra, is different and inapplicable because the state could not be joined as a party because of the Eleventh Amendment. The Texas law specifically provides that a county can be sued and must be sued if it is to be bound by a judgment. 15 Tex.Jur.2d, Joinder of Parties, Sec. 168. The Court noted in *Hutto v. Finney*, supra, in note 32, that:

> "The Attorney General is hardly in a position to argue that the fee awards should be borne not by the State but by individual officers who have relied on his office to protect their interests throughout the litigation."

Such is not the case here since the District Attorney's client was the Sheriff and it was to the Sheriff's best interest for the attorney fees to be against the County. Therefore, the District Attorney could not protect the County's interest since it would conflict with the Sheriff's interest. The County has had a different attorney from that of Carl Thomas all during this litigation, as will be noted in the attempted intervention case. Obviously, if attorney fees must be paid, the former sheriff would prefer the County pay some or all of same and it would be a conflict of interest for his attorney to take any other position.

In terming a Texas county a convenient agency for the State, the United States Supreme Court has held that:

"It provides a convenient agency for the State to collect taxes, hold elections, administer judicial and peace-keeping functions, improve roads, and perform other functions which are the ordinary duties of the State. The powers of the Commissioners Court, which is the governing body of Midland County, are strictly limited by statute and constitutional provisions." *Avery v. Midland County, Texas*, 390 U.S. 474, at 502.

Article 9, Section 3, of the Texas Constitution at one time had a home rule provision for counties, but no home rule charter was ever adopted and the home rule provision of the Constitution was repealed August 5, 1969, by an election on that date which approved proposed H.J.R. No. 3, Acts 1969, 61st Legislature, page 3230. Article 5, Section 18, of the Texas Constitution provides that "... the Commissioners Court shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

(2) A TEXAS SHERIFF IS A STATE OFFICER IN EMPLOYMENT PRACTICES UNDER ARTICLE 6869, V.A.T.S.

Article 6869 is included in Appendix I and vests the sheriff with the employment authority for his deputies. The Commissioners Court is specifically denied the right to influence the selection of individual employees by other elected officers. Article 3902, V.A.T.S.

"The Commissioners Court can limit the number and salaries of Sheriff deputies, but they have no power over the naming of the individuals to be appointed and are especially prohibited from attempting any such last-named influence." *Tarrant County v. Smith*, 81 S.W.2d 537, 538 (Tex. Civ. App. - 1935), writ ref'd.

It was held in *Murray v. Harris*, 112 S.W.2d. 1091, (Tex. Civ. App. - 1938), writ dism., that:

> "The statute conferring upon the sheriff the power to appoint deputies fixes no definite term of office, but provides that the tenure shall be at the pleasure of the sheriff, which is tantamount to a provision that both the appointment and tenure are discretionary with him." 112 S.W. 2d at 1093.

While the head of a state agency is clearly a state officer, even a county official is *acting* as a state officer when acting under a state statute. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

(3) THE EDICTS AND ACTS OF A STATE OFFICER (SHERIFF) DO NOT CONSTITUTE EITHER STATE OR COUNTY POLICY.

One's status as an officer is determined by whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others. *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974). The Sheriff comes in this category since he alone has the authority to hire and fire. There is no indication in the Constitution or statutes that the Legislature has delegated the authority to the Sheriff of Dallas County, or the sheriff of any of the 254 counties in Texas, to make policy for the State of Texas. Art. 3, Sec. 1, of the Texas Constitution vests the legislative power of this State in "The Legislature of the State of Texas." The interpretive commentary, Texas Constitution, Vol. 1, V.A.T.S., p.55, referring to the Legislature, states "its primary function is to formulate the policy of the

State." It is clear that the Commissioners Court has been vested with "powers and jurisdiction over all county business." Texas Constitution, Art. 5, Sec. 18. Although the Commissioners Court has the jurisdiction for county business and county policy, they have no control over the employment practices of the Sheriff since is has been specifically denied them by statute.

When a county officer is acting under a state statute, it has been held that such officer is acting as a state officer. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In regard to the County Judge's duties in *Briscoe*, supra, the Court observed that:

> "... his duty in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility. Accordingly, under the standards set forth in *Monell* we hold that Medina County is not susceptible to liability under section 1983 for Judge Decker's issuance of the disclosure demands." 619 F.2d at 404.

In that case a county judge was acting under a state statute and the Court, therefore, held there was no liability on the county for attorney's fees under 42 U.S.C. §1988. In doing so, the Court held that:

> "Of course, since we have held Medina County not to be susceptible to this section 1983 suit under *Monell* — because Judge Decker's actions did not implement or constitute an official county policy — the county will share no responsibility for plaintiff's fees and costs." 619 F.2d at 406.

It has now been clearly established that in order to have liability under 42 U.S.C. § 1983, a plaintiff must show that the defendants "caused" an injury to the plaintiff. *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), cert. denied 101 S.Ct. 1392.

A county public official (supervisor of public defender) did not state a § 1983 claim against Polk County, although it did state a claim against the individuals, even though the County's governing board selected, paid, hired and fired the offender advocate and his subordinates. The Court stated that:

> "... Polk County has no authority to influence particular decisions that its public defenders make in representation of indigent defendants." *Dodson v. Polk County*, 628 F.2d 1104, (8th Cir. 1980), at page 1106, petition for cert. filed 101 S.Ct. 1478.

Even a single council member has been held unable to set policy alone and, therefore, the borough was not liable under Section 1983. *DiMaggio v. O'Brien*, 497 F.Supp. 870 (E.D. Pa. 1980). The use of a questionable amount of force and the making of questionable arrests of beachgoers by a sheriff and his deputies did not constitute "official policy". *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980), cert. den. 101 S.Ct. 1521. In so holding, the Court added:

> "We are also persuaded by the Supreme Court's opinion in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that we ought not hold a municipality or county liable in a *Bivens*-type action on the principle of respondeat superior." 621 F.2d at 1336.

The district court in *Dean v. Gladney*, supra, had awarded attorney fees against Deputy Sheriff Saldivar and former police officer Maddox, individually, but refused to assess attorney fees against the county or the State. The Court held that the failure to award attorney fees against Brazoria County and the City of Clute was proper since the beachgoers were not prevailing parties as to the City and County.

Since the Respondent has made no recovery against Dallas County and, as to it, is not the prevailing party, it was error for the Court of Appeals to hold that the County and Carl Thomas should be jointly and severally liable for attorney's fees under 42 U.S.C. § 1988. *Hanrahan v. Hampton*, 100 S.Ct. 1987 (1980), reh. den. 101 S.Ct. 33.

Although this Court specifically held in *Monell*, supra, at 98 S.Ct. 2031, that:

> "Section 1 without question could be used to obtain a damage judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of state law",

this Court specifically noted that:

> ". . . the language of Sec. 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless acting pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under Sec. 1983 on a respondeat superior theory." 98 S.Ct. at 2036.

There is insufficient nexus in this case between the employer and the alleged tortfeasor employee to impose liabilities on the employer. As has been pointed out herein, Dallas County had no control over Carl Thomas' employment practices because of Art. 6869, V.A.T.S., but, even if it did have the right to control him,

> ". . . the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support Sec. 1983 liability." *Monell*, supra, note 58, 96 S.Ct. at 2037.
>
> "A local government may not be sued for an injury inflicted solely by its employees or agents." *Monell*, supra, 98 S.Ct. at 2038.

To hold otherwise could encourage instead of discourage public officials to violate a person's constitutional and civil rights. If a public official is allowed to violate civil rights of another and then require the County to pay the § 1983 damages and attorney's fees or the plaintiff's attorney's fees under 42 U.S.C. § 1988 in a § 1983 case seeking only equitable relief, such a holding, as the Court of Appeals made in this case, would permit a public official to discharge all employees of the opposite party who did not support the public official and then, if it were called to the Court's attention, the County, and not the Sheriff, would be required to pay the 42 U.S.C. § 1988 attorney's fee award. An unscrupulous public official would have a field day at public expense. The Civil Rights Act of 1871 was not intended to encourage this type of action. County officers will be more reluctant to violate the principles of *Elrod v. Burns*, 65 S.Ct. 347 (1945), when they face personal financial responsibility for such

actions. However, if the county were liable for monetary relief in matters of this nature, the personal risk faced by the officer as a practical matter could become minimal. Thus the threat of potential lawsuits would have less deterrence on an officer considering terminating employees for political reasons in order to reward his own supporters. Instead, it would place the financial responsibility upon the Commissioners Court which has no authority to control these personnel actions. Such a burden would be placed upon the Commissioners Court solely under the theory of respondeat superior in spite of any policies that it could establish to discourage such incidents. Such a burden would also completely undermine the responsibility of the Commissioners Court to establish an appropriate budget for Dallas County. This Civil Rights Act, 42 U.S.C. § 1983, was not intended to reach such a result.

Tyler v. Woodson, 597 F.2d 643 (8th Cir. 1979), followed the holding in *Monell*, supra, that isolated acts by public officials are not enough to subject a municipality to § 1983 liabilities unless the acts are pursuant to some municipal policy. There was no evidence in the case at bar of either a county or state policy to that effect. Likewise, *Teague v. City of St. Louis*, 615 F.2d 773 (8th Cir. 1980), and *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), refused to hold the municipality liable where there was no showing that the damages were caused by the implementation of a municipal policy as distinguished from "acts" of a public official. There was no evidence in the case at bar that either the state or county had a policy which "caused"

Carl Thomas to violate the constitutional rights of Barrett or any other person. Indeed, it has been held that personal motivations of primary actors preclude the imputation of their conduct to others. *Wren v. Jones*, 457 F.Supp. 234 (S.D. Il, 1978), reversed on other grounds 635 F.2d 1277 (7th Cir. 1980).

It is also insufficient for the Respondent to argue that he should have an attorney fee judgment against the County for insurance purposes in the event Carl Thomas is unable to respond in damages. This Court rejected the "insurance" and "spreading the risk" theory in *Monell*, supra, by referring to the defeat of the "Sherman Amendment" and noted that:

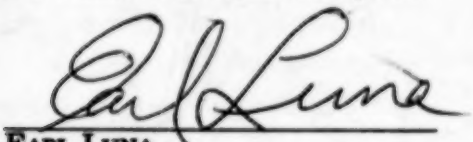
> ". . . Second is the argument that the costs of accidents should be spread to the community as a whole on an insurance theory . . . .
>
> . . . The second justification was similarly put forward as a justification for the Sherman Amendment: 'We do not look upon [the Sherman Amendment] as a punishment . . . It is a mutual insurance.' Id., at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment." 98 S.Ct. 2037-2038.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



EARL LUNA
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(214) 747-1582

ATTORNEY FOR PETITIONERS

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings in which they have been involved as named parties in the Courts below.

I further state upon oath that upon the 24th day of November, 1981, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, Benny B. Barrett, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. James C. Barber, 318 Merchants State Bank Building, 5217 Ross Avenue, Dallas, Texas 75206, and upon Carl Thomas by depositing same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. C. J. Baldree, Assistant District Attorney, Dallas County Courthouse, 600 Commerce Street, Dallas, Texas 75202.

Earl Luna

EARL LUNA

SUBSCRIBED AND SWORN TO before me by the said Earl Luna, this the 24th day of November, 1981.

Notary Public, Dallas County, Texas

Appendix

BENNY B. BARRETT, Plaintiff-Appellee
Cross-Appellant,

v.

CARL THOMAS, Sheriff, Defendant-Appellant
Cross-Appellee.

No. 79-3021.

United States Court of Appeals,
Fifth Circuit.

Unit A

July 10, 1981.

Appeal was taken from a decision of the United States District Court for the Northern District of Texas, Robert W. Porter, J., which, inter alia, held unconstitutional certain personnel regulations of the sheriffs' office of Dallas County, Texas, and which found that sheriff was liable to certain former deputies who were demoted or fired for their political affiliations. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad; (2) prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office; (3) Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations; and (4) attorney fees under Civil Rights Attorney's Fees Awards Act could run against Texas county

treasury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application.

Affirmed in part; vacated in part; reversed and rendered in part.

Brown, Circuit Judge, filed concurring opinion.

1. Constitutional Law — 90.1(1)

Sheriff's office personnel regulations concerning public statements or discussion of policy matters with elected officials or department heads were unconstitutionally overbroad. U.S.C.A.Const. Amend. 1.

2. Constitutional Law — 90.1(1)

Prohibitions on "conduct subversive of the good order of discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional in context of rules regulating sheriff's office. U.S.C.A. Const. Amend. 1.

3. Constitutional Law — 90.1(1)

Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and department morale, provided that those interests outweigh employee's interests in commenting on matters of public concern; however, in an effort to limit offensive speech, public employer may not employ a prophylactic approach that prohibits constitutionally protected expression. U.S.C.A.Const. Amend. 1.

4. Constitutional Law — 90(1)

Overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. U.S.C.A.Const. Amend. 1.

5. Constitutional Law — 90.1(1), 91
Sheriffs and Constables — 21

Sheriffs, like other elected county officials in Texas, have wide-ranging discretion in selection of their employees and therefore deputy sheriffs have no legal entitlement to their jobs as public employees and may be fired for many reasons or for no articulable reason at all; however, sheriff may not condition continuation of public employment on an employee's relinquishment of First Amendment liberties of political belief and association. U.S.C.A Const. Amend. 1.

6. Sheriffs and Constables — 21

Texas statute providing that deputies serve "at the pleasure" of sheriff did not entitle sheriff to demote or fire deputies on basis of their political affiliations. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. art. 6869.

7. Civil Rights — 13.10, 13.13(1)

Qualified immunity is an affirmative defense to a section 1983 action and burden of pleading and proving it rests with defendant. 42 U.S.C.A. § 1983.

8. Federal Courts — 616

Sheriff, who was named defendant in section 1983 suit challenging certain personnel actions, was not entitled to claim defense of qualified official immunity, which was raised for first time on appeal. 42 U.S.C.A. § 1983.

9. Civil Rights — 13.17

Although various class members did not prevail on every aspect of relief sought in section 1983 suit challenging disputed personnel actions taken by sheriff and constitutionality of certain personnel regulations of sheriff's office, favorable disposition of their claim for injunction against departmental conduct rules entitled them to recover attorney fees. 42 U.S.C.A. §§ 1983, 1988.

10. Civil Rights — 13.17

Attorney fees under Civil Rights Attorney's Fees Awards Act could run against Texas county treasury for section 1983 violations by sheriff acting in his official capacity even though county was not named as defendant in suit and was denied opportunity to intervene in late stages of litigation partially due to plaintiff's opposition to untimeliness of intervention application. 42 U.S.C.A. §§ 1983, 1988; Fed.Rules Civ. Proc. Rule 24, 28 U.S.C.A.

Henry M. Wade, Criminal Dist. Atty., Dallas County Texas, Dallas, Sue L. Lagarde, Asst. Dist. Atty., Dallas, Tex., for defendant-appellant, cross-appellee.

James C. Barber, Steven B. Thorpe, Dallas, Tex., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, THORNBERRY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal, argued and decided in tandem with *Collins v. Thomas*, 649 F.2d 1203 (5th Cir. 1981), arises from disputed

personnel actions taken by Carl Thomas during his tenure as Sheriff of Dallas County, Texas. It addresses the constitutionality of certain rules regulating the conduct of employees in the Dallas County Sheriff's Office, the merits of 42 U.S.C. § 1983 claims brought by former deputy sheriffs alleging that they were demoted or fired by Thomas for their political affiliations, and Dallas County's liability for a 42 U.S.C. § 1988 attorneys' fees award against Sheriff Thomas. We vacate the district court's injunction against § 15 of the Sheriff's Office Code of Conduct; we believe § 15 is facially unobjectionable and constitutional as applied here. We reverse the district court's determination that Dallas County is not liable for the § 1988 award against Thomas and render judgment holding the County jointly and severally liable with the Sheriff for the attorneys' fees award. We affirm the district court's disposition of the remaining issues presented on appeal.

I. The Facts

Benny Bob Barrett joined the Dallas County Sheriff's Office ("the department") as a patrolman in May 1966. Barrett had compiled a solid work record and advanced to the position of sergeant in the Criminal Investigation Division when Republican Carl Thomas defeated Clarence Jones, the Democratic incumbent, in the November 1976 election. After taking office, Thomas transferred Barrett, a Jones supporter, laterally to the Civil Warrants Division in March 1977. Later, in August of the same year, he was demoted to the position of detention officer.

Peeved by his demotion, which entailed reductions in pay, benefits, and prestige, Barrett told a newspaper reporter on August 20 that Thomas was a "paranoid" person with a

"Hitler mentality". These remarks were quoted verbatim in a newspaper story published the same day. On August 22, Barrett went before a public meeting of the Dallas County Commissioners' Court to criticize Thomas for conducting a political purge in the Sheriff's Office. On August 23, Thomas fired Barrett. The discharge notice stated that Barrett's published remarks violated Dallas County Sheriff's Office Code of Conduct §§ 12 & 15.[1]

---

1. § 12 provides: Gossip and Confidential Information

Gossiping about affairs of the department, or the members of it, making unauthorized public statements, or the unauthorized revealing of confidential information of any kind, is prohibited.

a. No member of the department shall make known any information concerning the progress of an investigation, a known or reported law violation, or condition against which action is to be taken, at a future time, or any proposed Sheriff operation of any type, to any person not authorized to receive it.

b. It is expressly forbidden to give any lawyer, bondsman, or the agent of either, or any other person unauthorized information regarding prisoners in confinement.

§ 15 provides: Willful Disobedience or Insubordination

No member of the department, to whom a lawful order is addressed by a supervisory officer, shall willfully disobey that order, and no conduct subversive of the good order or discipline of the department will be tolerated.

Continuous or willful violations of this Code of Conduct are punishable under this rule.

a. no deputy shall use abusive, insulting, or indecent language to a supervisory officer.

Within a week of Barrett's firing, the Sheriff issued General Rules "to clarify," Thomas testified, the conduct proscribed by §§ 12 & 15. Thomas conceded on direct examination that, although these Rules were not in writing at the time Barrett was discharged, he considered them to be effective and enforceable against Barrett. Record, vol. III, at 95. Rules 1 and 2 provide:

1. No employee of this department will address any statement or remark to any member of the news media that is or could be of a controversial nature. All requests will be referred to the Sheriff even during my absence.

2. No member of this department will discuss any matters pertaining to policy or procedure of this department with any elected official or department head.

Barrett brought this § 1983 class action on behalf of all sheriff's office employees who had been demoted or fired by Sheriff Thomas for supporting Sheriff Jones in the 1976 election. His original complaint alleged that, in firing or demoting employees who did not support him in the 1976 election, Thomas abridged first amendment speech and associational rights. The complaint also challenged the constitutionality of personnel regulations governing public statements by Sheriff's Office employees, *see* n. 1, *supra*, on grounds of vagueness, overbreadth, and as impermissible prior restraints on protected speech.[2]

After issuing a preliminary injunction against enforcement of the challenged personnel regulations and certifying the plaintiff class, the trial judge presided over a jury trial on the merits in January 1979. In response to a series of interrogatories, the jury found that political considerations had motivated Thomas to transfer, demote, or discharge various plaintiff class members.[3] The jury determined that political

2. The complaint also joined a pendant state law claim for defamation based on a press release issued by Thomas indicating that Barrett had been fired for being a "lazy individual." After prolonged deliberation, the jury was unable to reach a verdict on Barrett's defamation claim. The trial court then dismissed the pendant claim without prejudice.

3. Although Thomas failed to raise the objection at trial, he asserts on appeal that the trial court incorrectly worded the jury interrogatory asking whether the plaintiffs were wrongfully transferred, demoted, or discharged for exercising their constitutionally protected rights of speech and political association. Specifically, Thomas contends that the charge was defective because it inquired of the jury whether the plaintiffs' political affiliations and activities were "motivating factors" in their transfers, demotions, or discharges. The court advised the jury that the plaintiffs bore the burden of proof on this question. The Sheriff insists that a proper formulation of the question would have made clear that plaintiffs must prove that their constitutionally protected activities were either the "primary" or the "sole" cause of their firings or demotions.

considerations were a motivating factor in Barrett's transfer and demotion, but that Thomas did not discharge Barrett for political reasons. The jury was instructed that the scope of law enforcement officers' free speech rights is circumscribed by a balancing test weighing the public interest in regulating such speech against the speaker's private interest in making the comments. Based on this instruction and the Sheriff's concession that Barrett was fired for calling Thomas a "paranoid" person with a "Hitler mentality," the jury determined that Barrett's criticism of Thomas was not protected speech.

On the basis of these jury findings, the district court struck down each of the challenged personnel regulations for vagueness and overbreadth. The court permanently enjoined further enforcement of the regulations and decreed that certain members of the plaintiff class who were fired or

These contentions are devoid of legal merit. In addition to the inquiry whether political considerations were "motivating factors" in the challenged personnel actions, the court submitted for the jury's consideration this question:

> Do you find from a preponderance of the evidence that the defendant would have reached the same decision as to the class members' transfer, demotion or discharge absent consideration of the class members' political party affiliation, the failure to support the defendant, or the support of the defendant's opponent in the political campaign? (Burden of proof on defendant)

In its special verdict, the jury answered "no" to this question. As a matter of law, this formulation of the issue comports with the Supreme Court's holding regarding the nexus a public employee plaintiff must prove between his exercise of first amendment rights and an adverse personnel action. *Doyle v. Mt. Healthy City Board of Education*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977) (plaintiff must prove that protected activities were a "substantial factor" in the decision to discharge).

In any event, Fed.R.Civ.P. 51 precludes our consideration of this issue at the threshold. The Sheriff waived any error in the jury instructions by his failure to object at trial.

demoted for their political affiliations were entitled to reinstatement with back pay. The trial judge accepted the jury's verdict that Thomas had not fired Barrett for his political associations and that Barrett's remarks to the press were constitutionally unprotected.[4]

While the court found that Barrett was entitled to back pay compensating for his politically-inspired demotion, it denied him reinstatement to his former position. Attorney's fees were awarded to the prevailing plaintiffs. An April date was set for a hearing to fix the amounts of back pay and interest due each individual member of the plaintiff class and to review the attorney's fee request filed by the plaintiff's attorney.

One week before the scheduled April hearing — more than three months after the jury trial — Dallas County moved to intervene. The County argued that an adjudication of Thomas' liability in its absence would impair its interest in protecting the County treasury against the plaintiff's claims. The plaintiffs opposed Dallas County's intervention, contending that the County's motion was untimely, that the County's expressed disclaimer of liability for the sheriff's personnel decisions negated its assertion of an interest in the outcome of the April hearing, and that the County interests were adequately represented by the county district attorney's representation of the sheriff, who shared the County's interest in minimizing liability to the plaintiffs. Stressing that County intervention would pose the threat of a prejudicial

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4. The trial judge determined, notwithstanding the jury verdict, that Barrett's comments to the County Commissioners were protected. This finding did not obviate, however, the justification for Barrett's discharge based upon his statements to the press.

delay at a time when the lawsuit was nearly resolved, the district court denied the motion to intervene.[5]

The district court then proceeded with the scheduled April hearing. In a judgment specifying the terms of relief granted to the members of the plaintiff class, the court, on May 20, ordered reinstatement of nine demoted or discharged employees and fixed the amounts of back pay and interest due fourteen members of the plaintiff class. The court fixed the plaintiffs' attorney fee award at $34,015, but specified that the judgment "is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." Subsequently, in August, Judge Porter decided that the attorney's fees award would not lie against County funds, apparently because the plaintiff had affirmatively opposed the County's attempt to intervene prior to the April hearing.

On this appeal, the Dallas County District Attorney contends, *inter alia*,[6] that, (1) the personnel regulations enjoined by the district court are constitutional; (2) the sheriff's personnel actions were permissible; (3) the Sheriff is immune from this lawsuit; and (4) the attorney's fees

5. The County brought an interlocutory appeal from this decision. This Court affirmed the district court's denial of the County's intervention motion without a published opinion under F.R.A.P. 34(a) and 5th Cir. R. 18. The Supreme Court denied the County's petition for a writ of certiorari. *Weber v. Barrett*, ... U.S. ..., 101 S.Ct. 1729, 68 L.Ed.2d 218 (1981).

6. Appellants raise questions going to aspects of the relief granted to plaintiff class members. Masters, Smith, Lowther, and Baker. They also insist that the district court erred in finding, notwithstanding the jury's verdict, that Barett's comments to the County Commissioners' Court were constitutionally protected speech. Upon review of the record and the trial judge's lucid memorandum opinion, we find these contentions meritless and summarily affirm the district court.

award was improper because the plaintiffs did not "prevail" as required by 42 U.S.C. § 1988. The plaintiffs cross-appeal the trial court's determination that Dallas County is not liable for the attorney's fees award.

II. The Challenged Personnel Regulations

[1] The district court struck down each of the four Sheriff's Office personnel rules, *see* n. 1 *supra*, challenged by the plaintiffs for overbreadth and vagueness.[7] Of course, either vagueness or overbreadth standing alone would present a fatal defect in the regulations. While the district court may well have been correct in concluding that three of the challenged regulations are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1925), we do not reach that question with respect to § 12 of the Sheriff's Office Code of Conduct or General Rules 1 and 2. We affirm the judgment below invalidating these regulations on the premise that these three "sweep unnecessarily broadly and thereby invade the area of protected freedom." *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed.2d 325 (1964).

[2] Section 15, however, is a different story. We find the prohibitions on "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" facially constitutional in the context of rules regulating police department conduct. *Cf. Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), *cert. denied*, 430 U.S.

7. The district court declined to reach plaintiffs' claim that the regulations also imposed constitutionality impermissible prior restraints. The issue is not before us on appeal.

931, 97 S.Ct. 1552, 51 L.Ed.2d 775 (1977) (upholding police officer's discharge for breach of regulation forbidding conduct "which tends to subvert the good order, efficiency, or discipline" of the police department). While we can envision circumstances in which § 15 would be unconstitutionally vague or overbroad as applied,[8] this case does not present that problem. We are reluctant to circumscribe narrowly the sheriff's discretion in promoting the legitimate ends of "discipline, esprit de corps, and uniformity" among his law enforcement officers. *Kelley v. Johnson*, 425 U.S. 238, 246, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976).[9] Therefore, we reverse that

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8. *E. g., Bence v. Breier*, 501 F.2d 1185, 1193 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821 (1975) (police department regulation prohibiting "conduct unbecoming a member and detrimental to the service" unconstitutionally vague as applied to police officers who wrote a letter to a labor negotiator regarding terms of their employment).

   Had Barrett been dismissed for his appearance before the County Commissioners on the basis of § 15 alone, we would have no hesitation in declaring the admittedly elastic language of the regulation unconstitutionally overbroad as applied. Similarly, the prohibition of acts subversive of good order might well be stretched to proscribe conduct in a manner that would render the regulation unconstitutionally vague as applied. In this case, however, Barrett's termination cited conduct (*i. e.* his remarks to the press) to which § 15 can properly be applied.

9. We are not equating the peculiar milieu of a law enforcement agency to military service. *Kannisto v. City and County of San Francisco*, 541 F.2d at 843. The Supreme Court has firmly held that police officers enjoy the full complement of First Amendment protections. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). The public employer's interest in regulating the speech of police officers does not rise to the level of the government's interest in regulating the conduct of military personnel. *See Brown v. Glines*, 444 U.S. 348, 354, 100 S.Ct. 594, 599, 62 L.Ed.2d 540 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Davis v. Williams*, 617 F.2d 1100, 1104 (5th Cir. 1980) (en banc), *cert. denied*, ... U.S. ....., 101 S.Ct. 336, 66 L.Ed.2d 160 (1980) ("[W]e are loathe to equate a municipal fireman with a paratrooper or even with such a quasi-soldier as the recalcitrant officer-dermatologist Levy.").

portion of the district court's judgment holding § 15 unconstitutional and vacate the provision of its permanent injunction barring enforcement of § 15.

[3] The First Amendment freedoms infringed by the other challenged regulations are not absolute. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Public employers may legitimately curtail public criticism from their employees to promote efficiency, loyalty, and departmental morale, provided that these interests outweigh the employee's interests in commenting on matters of public concern. *Id.* Yet, in an effort to limit offensive speech, the public employer may not employ a prophylactic approach that prohibits constitutionally protected expression. *See Grayned v. City of Rockford*, 408 U.S. 104, 114-19, 92 S.Ct. 2294, 2302-05, 33 L.Ed.2d 222 (1972). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963).

[4] The overbreadth doctrine stands as a barrier against governmental regulation of speech which undertakes to limit proscribable speech but sweeps too broadly and inhibits protected expression. Parts of Section 12 and General Rules 1 and 2 collide with this barrier. Section 12 flatly prohibits "unauthorized public statements." General Rule 1 denies department employees their right to speak to reporters on any topic "that is or could be of a controversial nature." General Rule 2 forbids discussions of Sheriff's Office policy or procedure with "any elected official." Section 12 and Rules

1 and 2 are facially overbroad. They explicitly forbid acts that departmental employees have a clear constitutional right to do. Although promoting loyalty, discipline, and efficiency in the department is a legitimate goal, these rules sweep beyond their intended ambit and impermissibly chill protected speech by the department's employees.

III. Executive Discretion and Patronage Dismissals

The trial judge instructed the jury that Barrett and the plaintiff class bore the burden of proof in establishing that Sheriff Thomas' personnel actions were politically motivated patronage firings. The jury found that plaintiffs had carried their burden. Yet, Thomas insists that the broad discretion vested in Texas county sheriffs by Tex.Rev.Civ.Stat.Ann. art. 6869 (Vernon 1960) authorizes his conduct. Under art. 6869, deputies serve "at the pleasure" of the sheriff.

[5, 6] Sheriffs, like other elected county officials in Texas, have indisputably wide-ranging discretion in the selection of their employees. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). It follows that deputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all. Nevertheless, there are overriding limits on the sheriff's discretion in employment matters. He may not condition continuation of public employment on an employee's relinquishment of the First Amendment liberties of political belief and association. *Perry v. Sinderman*, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972). The establishment of a political orthodoxy among public employees by an executive official is constitutionally impermissible.

The facts and legal claims presented in this case are strikingly similar to those confronted by the Supreme Court in

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Republican non-civil-service employees of the Cook County, Illinois, Sheriff's Office who had been swept out of their jobs in the wave of political patronage hirings and firings following the replacement of the incumbent Republican sheriff with a Democrat sued Sheriff Elrod for depriving them of their constitutionally protected rights to affiliate with a political party of their choice. Five members of the Supreme Court joined in holding these patronage firings unconstitutional deprivations of political liberty.

The plurality opinion noted that political patronage dismissals restrict the individual liberties of belief and association at the core of the First Amendment. While these rights are not absolute, they may not be trenched upon absent a showing that the liberty-restraining patronage system furthers "some vital government end by a means that is least restrictive of freedom of belief and association . . . ." *Id.* at 363, 96 S.Ct. at 2685. Sheriff Thomas has not pointed to a vital governmental interest served by making his deputies toe the prescribed political line. He has likewise not shown that such line-toeing is the least restrictive means of achieving a legitimate objective.

This Court recently addressed § 1983 claims regarding political patronage firings emanating from the Lake County, Florida, Sheriff's Office. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980). In holding that the *Tanner* plaintiffs had failed to meet the burden of making a prima facie showing that Sheriff McCall's personnel decisions were motivated by political animus, the Court set out a legal blueprint for applying *Elrod v. Burns* principles of § 1983 claims alleging political patronage dismissals. *Tanner* contemplates a three-step inquiry on review. First, have the plaintiffs alleged

conduct that, if proven, would constitute an infringement of their constitutional rights? Second, have the plaintiffs made a prima facie showing that impermissible political animus, motivated the challenged personnel decisions? Finally, have the defendants rebutted such a showing with sufficient evidence of nonpolitical motives for the challenged conduct?

The pleadings filed by Barrett and the plaintiff class properly put in issue the constitutional claim. The trial record amply supports the jury's finding that the constitutionally protected political activities or associations of Barrett and the plaintiff class were motivating factors in Sheriff Thomas' personnel decisions. On these facts, the plaintiffs have met their burden of pleading and proving a deprivation of constitutional rights motivated by political animus. Sheriff Thomas, on the other hand, has failed to rebut this showing to the jury's satisfaction with evidence "that the same employment decisions would have been reached regardless of the constitutionally protected conduct." *Tanner v. McCall*, 625 F.2d at 1190. Therefore, affirmance of the jury's verdict is warranted.

Nevertheless, the Sheriff insists that his deputies are not entitled to the usual degree of protection from the changing tides of political fortune. Sheriff Thomas maintains that his deputies are confidential, policymaking employees within the exceptional class of public servants of whom political allegiance may be demanded. *See Elrod v. Burns*, 427 U.S. at 364-68, 96 S.Ct. at 2685-87; *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979).

The Supreme Court recently refined the process of identifying those employees to whom the policymaker classification should be applied. *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In dismissing the labels

"confidential" and "policymaker" as irrelevant, the Court declared, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295. The terms "confidential" and "policymaker" illuminate the contours of the employee class that may permissibly be subjected to a political litmus test, but any specific application of the exception must turn on the importance of political loyalty to the execution of the employee's duties.

The job duties of the plaintiff class range from clerical work to law enforcement. They are precisely the same duties performed by the plaintiffs in *Elrod v. Burns*, where the confidential and policymaking exception was deemed not to apply. Sheriff Thomas offers no satisfying justification for demanding greater political loyalty from his deputies than Sheriff Elrod was entitled to expect from his employees. In a sheriff's department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship. The rule of *Elrod v. Burns*, not the exception, applies here.

IV. Immunity

Falling back to his next line of defense, Sheriff Thomas seeks "the Court's indulgence" in raising — for the first time on appeal — the defense of qualified official immunity. The Sheriff, as an executive official of Dallas County, is entitled to claim immunity from suits over good faith acts performed in furtherance of his governmental duties. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

[7, 8] Qualified immunity, however, is an affirmative defense; the burden of pleading and proving it rests with

the defendant. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 (1980). Sheriff Thomas' failure to interpose the immunity defense until this appeal leaves this court with no record to review on the question at the core of this defense: were Sheriff Thomas' actions based on a reasonable belief that the demotions, transfers, and dismissals were lawful? The court below did not explore this issue of fact and law — it was not raised. Powers of mystical insight, not mere "indulgence," would be necessary for us to accommodate the sheriff's request that we consider his belated immunity claim for the first time on appeal. We properly refrain from this suggested adventure in mysticism. It comes after the opportunity to litigate the issue has ended.

V. Attorney's Fees

Finally, we turn to the parties' conflicting contentions on whether the district court should have awarded attorney's fees to plaintiff's counsel under 42 U.S.C. § 1988, and, assuming the award was proper, whether it may be recovered from the county treasury.

[9] Sheriff Thomas, clinging to the defenses we have found to be meritless, maintains that the plaintiffs are not "prevailing parties" within the meaning of § 1988. Although various members of the plaintiff class, including Barrett, did not prevail on every aspect of the relief sought, the favorable disposition of their claim for an injunction against the departmental conduct rules, discussed in Part II, *supra*, entitles the plaintiffs to recover attorney's fees under § 1988. *Coen v. Harrison County School Board*, 638 F.2d 24, 26 (5th Cir. 1981) (per curiam.) The district court's decision to award attorney's fees to plaintiff's counsel merits our affirmance. The amount awarded is not in issue.

[10] The question remains whether the attorney's fees award lies against Dallas County. Sheriff Thomas possessed complete authority to hire and fire the plaintiff class members under art. 6869. Under this Texas law, his "acts or edicts may fairly be said to represent official [County] policy." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). It is now settled law that a § 1988 attorney's fees award may run against a public treasury for § 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit. *Hutto v. Finney*, 437 U.S. 678, 699, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522 (1978).

The issue presented here is whether deviation from the *Hutto v. Finney* rule is warranted when Dallas County, whose treasury is otherwise vulnerable to the fee award, was denied an opportunity to intervene in the late stages of this litigation in part because the plaintiffs opposed the County's intervention. The district court decided that plaintiffs could not satisfy their attorney's fee award against the County treasury. While § 1988 vests discretion over a fee award in the trial court, the prevailing party is ordinarily entitled to recover a fee unless special circumstances render the award unjust. *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978). Finding no justification here for denying the prevailing plaintiffs their attorneys fees, we reverse the district court's refusal to hold Dallas County jointly liable with Sheriff Thomas for the fee award.

Measured against the standards for timely Fed.R.Civ.P. 24 intervention established in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), Dallas County's motion to intervene was clearly tardy. This suit was pending for two

years and had been tried on the merits before the County's motion was filed. Moreover, the County's interests were adequately represented at each stage of the proceedings by the county district attorney's representation of Sheriff Thomas. *Cf. Hutto v. Finney*, 437 U.S. at 699, 98 S.Ct. at 2578 (stressing that the State of Arkansas' interests had been represented throughout the litigation by the State Attorney General's representation of the Department of Corrections officials). The denial of the County's motion to intervene and the plaintiffs' opposition to the intervention do not render an award running against the County unjust under these circumstances.

Dallas County stands to suffer no more severe budgetary disruption than any public entity held liable under *Hutto v. Finney* for the § 1983 violations of its official policymakers. Nothing the Supreme Court's observations on the inherent unfairness of awarding attorney's fees against the public officials individually without permitting the claim to run against the public entity, *Hutto v. Finney*, 437 U.S. at 699 n. 32, 98 S.Ct. at 2578 n. 32, we hold that the district court abused its discretion in refusing to enter judgment allowing the attorney's fees award to run against Dallas County. Therefore, we reverse and render judgment holding Dallas County jointly and severally liable for the § 1988 attorneys fees awarded plaintiffs' counsel in this action.

To summarize our holding, we affirm the judgment below in all but two respects. We vacate the portion of the trial court's injunction invalidating § 15 of the Sheriff's Office Code of Conduct. We reverse and render judgment on Dallas County's liability for the § 1988 attorneys fees award to plaintiffs' counsel.

AFFIRMED IN PART; VACATED IN PART; REVERSED AND RENDERED IN PART.

JOHN R. BROWN, Circuit Judge, concurring:

I concur fully in sections I through IV of the Court's opinion, but specially concur in section V because bound by *Families Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), repeated in *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980).[1]

My problem is that in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), finding county or municipal entities to be a "person" under § 1983, the Supreme Court confines this new-found liability to situations in which the action represents official policy, not just the unconstitutional act of an officer or agent of the entity.[2]

It seems incongruous to me that the Supreme Court meant to hold that Congress intended action to be that of the entity as a sort of "official" governmental policy when the officer-agent is acting in a crass, flagrant violation of established constitutional rights. Especially is this true since, under *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), such an official (and hence the City, County entity) is denied the defense of good faith immunity when sued in an official capacity. *See Universal Amusement Co. v. Hofheinz*, 646 F.2d 996, 997 (5th Cir. 1981); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

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1. Vacated on grant of Rehearing En Banc now pending before the full Court.

2. The Court stated:

> We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the government as an entity is responsible under § 1983.

The public treasury is made to bear the consequences of actions by an officer-agent no matter how flagrant or spectacular the unconstitutional conduct might have been on the theory that somehow such person is carrying out the official governmental policy of the entity.[3]

3. Lurking also is the question of the Eleventh Amendment, which, for the present, I do not discuss.

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-2183

Summary Calendar*

BENNY B. BARRETT,

Plaintiff-Appellee,

v.

CARL THOMAS, Sheriff,

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,

Movants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(April 11, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.
PER CURIAM:

A former employee of the Sheriff of Dallas County, Texas, acting as representative of persons then or previously employed by the Sheriff, brought suit to enjoin the enforcement of certain of the Sheriff's rules on the ground that these

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

unconstitutionally impaired his Fourteenth and First Amendment rights, to gain reinstatement and to recover back pay. After a jury trial concerning the discharge and back pay issues and the entry of an interim judgment of liability against the Sheriff, but before the district judge had entered a final judgment, the Dallas County Commissioner and the County Judge sought to intervene because county funds might be liable for a judgment against the Sheriff. They sought a declaration that the County is not liable. The trial court denied the motion to intervene on the triple grounds that it was untimely, that the Sheriff adequately represented their interest and that the parties would be prejudiced by belated intervention. Findings that the trial judge did not abuse his discretion, we affirm.

Any intervention, whether permissive or of right, must be asserted by "timely application." Fed. R. Civ. P. 24(a),(b). Timeliness is not measured by a judicial stop watch or by a pleadings guage; its determination rests on the sound discretion of the trial judge. NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, ... L.Ed.2d ..... (1973); Stallworth v. Montsanto Co., 558 F.2d 257, 263 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1133 (5th Cir. 1970); C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972). That discretion turns in large measure on the length of time during which the proposed intervenor knew of the suit and its possible effect on him and the prejudice to other parties that would ensue from granting the motion at that stage of the litigation. Stallworth v. Montsanto Co., 558 F.2d 257, 264-65 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1236 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970); *see* NAACP v. New

York, 413 U.S. 345, 366-70, 93 S.Ct. 2591, 2603-04, ... L.Ed.2d ....., ... (1973). The trial judge should also consider prejudice to the would-be intervenor from being denied intervention and the existence of "unusual circumstances" militating for or against a finding of timeliness. Stallworth v. Montsanto Co., 558 F.2d 257, 265-66 (5th Cir. 1977).

The suit had been pending more than two years and had been tried on the merits when the motion was filed. The trial judge found that the County Commissioners knew of the suit and had ample opportunity to intervene earlier. The Commissioners do not deny this; they instead assert that only after money judgment was imminent did they realize that the plantiffs might seek to collect from county funds.

The failure subjectively to appreciate the perils posed by a suit cannot excuse delay. To permit intervention while the trial court was deliberating on a judgment, after all proceedings in the case had been completed, would have injected new issues and required new briefs, new argument and, perhaps, additional evidence. There was ample support for the judge's decision that the parties would suffer substantial prejudice and appreciable delay.

There is no irreparable prejudice to the County Commissioners. Judgment was entered against the Sheriff alone. It expressly states that it "draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." If execution on the judgment is levied on county funds, the County may then oppose it.

Accordingly, the judgment if AFFIRMED.

Therefore, Defendant is hereby ordered to respond to the interrogatories within 20 days of the entry of this order, and this order is not stayed pending any appeal to the Fifth Circuit.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Date: September 6, 1979

U. S. District Court
Northern District of Texas
FILED
Aug. 29, 1979
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

No. CA3-77-1501-F

BENNY B. BARRETT,

v.

CARL THOMAS, Sheriff,

ORDER

Plaintiff has moved to tax attorneys' fees and costs against county funds and for writ of execution and/or other necessary orders. The defendant has moved for a stay of execution and judgment pending appeal on brief. I hereby deny Plaintiff's request to tax attorneys' fees and costs against county funds because the county sought to intervene in this case and the Plaintiff actively opposed the county's intervention. The county could have been permitted to intervene for the sole purpose of contesting attorneys' fees, but after reviewing Plaintiff's opposition I determined that I would not permit the county to intervene, and that the question of whether or not the county was liable for Carl Thomas's attorney fees would not be passed upon in this case. I decline to do so at this time, and again make no

determination one way or the other as to whether or not the county is liable to pay plaintiff's attorneys' fees and costs.

Rule 62(d) provides that when an appeal is taken the appellant, by giving a supersedeas bond, may obtain a stay of execution of judgment pending appeal. I will not stay the execution of this judgment pending appeal unless the supersedeas bond is posted. Houston Fire & Casualty Insurance Co. v. Ivens, 323 F.2d 112 (5th Cir. 1963). See Local Rule 12.4, Northern District of Texas. I will postpone Plaintiff's request to execute on this judgment for 8 days to enable the defendant to secure a supersedeas bond. If, at the expiration of 8 days, the Defendant has not filed a supersedeas bond in accordance with the order of this Court, I will permit execution to issue.[1]

---

1. If a court chooses to depart from the usual requirement of a full security supersedeas bond to suspend the operation of an unconditional money judgment, it should place the burden on the moving party to objectively demonstrate the reasons for such a departure. It is not the burden of the judgment creditor to initiate contrary proof. *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, ... F.2d ..... (5th Cir., Aug. 20, 1979).

   There is no evidence in this record that the Defendant Sheriff Thomas is presently capable of responding to the judgment or that that capability will continue for some time into the future. If such a showing had been made, the Court in its discretion might have substituted some form of guaranty of judgment responsibility for the usual supersedeas bond. *Poplar Grove, supra.*

   There is also no evidence in the record, although Defendant's counsel represented to the Court that the Sheriff would be unable to assume the financial burden of a supersedeas bond in the amount of the judgment or the judgment plus front pay, that the Sheriff is unable to post a full bond. Assuming that the Sheriff is unable to do so, there is no suggestion concerning what form of alternative security would provide the Plaintiff and the class equal protection. Thus, a supersedeas bond for the full amount of the judgment plus estimated front pay is required. *Poplar Grove, supra.*

The judgment in this case amounts to approximately $98,000, with additional costs and attorney's fees in the amount of $36,000. In addition, the court awarded front pay which accrues at the rate of $4,175 per month until seven (7) deputies are reinstated. The Local Rules for the Northern District of Texas require that a supersedeas bond in the amount of the judgment plus 20% be posted. Therefore, the Defendant shall post within 8 days of the entry of this order a supersedeas bond in the amount of $160,800.[2]

It is so Ordered.

UNITED STATES DISTRICT JUDGE

Dated: August 29, 1979

2. The Court has given the Defendant 10 days to post a bond. If Defendant wishes to appeal this order through an emergency appeal to the Fifth Circuit, the Court will stay the operation of this order and execution in this case for so long as it takes to hear the emergency application, if that process takes a reasonable period of time.

U. S. District Court
Northern District of Texas
FILED
May 31, 1979
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-1501-F

BENNY B. BARRETT,

v.

CARL THOMAS, Sheriff,

JUDGMENT

The Court hereby enters the following judgment in this case:

(a) Section 12 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 12 of the Sheriff's Code of Conduct;

(b) Section 15 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 15 of the Sheriff's Code of Conduct;

(c) Sheriff Thomas's General Rule 1 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and

successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 1;

(d) Sheriff Thomas's General Rule 2 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 2;

(e) Only 28 persons who filed claims with the court stating that they were individually entitled to a portion of any class relief granted by the court are potentially entitled to class relief in this case, and I enter judgment as follows on their claims:

(1) Bobby Don Baker is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,240.00 plus pre-judgment interest totaling $158.33, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sargeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant.

(2) Benny Bob Barrett is entitled to back pay from August 23, 1977 to September 13, 1977 in the amount of $259.00 plus pre-judgment interest totaling $17.29, but he is not entitled to reinstatement, and his claim for defamation is dismissed without prejudice for lack of jurisdiction as a pendent state claim;

(3) Michael L. Berson is entitled to back pay from August 16, 1977 to May 31, 1978 in the amount of $1,890.00 and pre-judgment interest totaling $133.37;

(4) L. F. Chennault is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,794.00 and pre-judgment interest in the amount of $17.22, im-

mediate reinstatement 30 days after the entry of fi[illegible] judgment in this case at full pay and benefits with the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sargeant;

(5) James A. Cline is entitled to back pay from February 3, 1977 to December 31, 1978 in the amount of $4,682.00 and pre-judgment interest on that amount totaling $357.41;

(6) Jesse Gordon Earls is entitled to back pay from January 2, 1977 to February, 1978, in the amount of $2,284.00 and pre-judgment interest on that amount totaling $219.31;

(7) Gilbert F. Ellis, Jr. is entitled to back pay from May 16, 1977 to August 31, 1977 in the amount of $234.00 and pre-judgment interest totaling $24.14, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a civil investigator, and "front pay" from June 30, 1979 in the amount of the difference between the pay of a civil investigator and the pay of a jailer to the date of his reinstatement as a civil investigator;

(8) Jess L. Hays is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 and pre-judgment interest totaling $187.05, immediate reinstatement 30 days after entry of this judgment at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(9) Roy Lee Heard is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,622.00 plus pre-judgment interest totaling $183.74, immediate rein-

statement 30 days after the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(10) Ray F. Masters is entitled to back pay from August, 1977 to June 30, 1979 in the amount of $31,268.00 plus pre-judgment interest totaling $1,134.15, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a lieutenant, and "front pay" at the rate of $1,615.00 per month from June 30, 1979 to the date of his reinstatement as a lieutenant;

(11) Walter Newell is entitled to back pay from January 1, 1977 to August, 1977, in the amount of $475.00 and pre-judgment interest on that amount totaling $41.88;

(12) Bobby J. Smith is entitled to back pay from January, 1977 to June 30, 1979 in the amount of $29,691.00 plus pre-judgment interest totaling $1,513.58, immediate reinstatement 30 days from the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $1,500.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(13) James W. Williams is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 plus pre-judgment interest in the amount of $187.05, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" in the amount of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(14) Roger Lowther is entitled to immediate reinstatement 30 days from the entry of judgment in this case as a warrant sergeant with full pay and benefits, and "front pay" in the amount, if any, of the difference between the salary of a warrant sergeant and a sergeant in I.D., from June 30, 1979 to the date of his reinstatement as a warrant sergeant;

(15) Larry Gwinn is not entitled to any back pay, or reinstatement;

(16) Joseph Amos Bolt's class claim for relief is dismissed without prejudice;

(17) Jim H. Kitching is not entitled to back pay or reinstatement;

(18) Alvin Maddox, Jr. is not entitled to back pay or reinstatement;

(19) Jack Dunn is not entitled to any back pay or reinstatement;

(20) J. W. Finley is not entitled to any back pay or reinstatement;

(21) Marion J. Gregory is not entitled to any back pay or reinstatement;

(22) Nathaniel Harvey is not entitled to any back pay or reinstatement;

(23) Donald C. Higgins, Jr. is not entitled to any back pay or reinstatement;

(24) Judy A. Lollar is not entitled to any back pay or reinstatement;

(25) Bobbie J. Moore is not entitled to any back pay or reinstatement;

(26) Rosanna Rojo is not entitled to any back pay or reinstatement;

(27) Hector Sehwerert is not entitled to any back pay or reinstatement;

(28) Reggie L. Taylor is not entitled to any back pay or reinstatement;

(f) Plaintiffs' attorneys are entitled to recover $34,015.00 as attorney's fees in this case;

(g) All costs are hereby taxed against the Defendant;

(h) This judgment is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas for complying with the provisions of this judgment.

It is so ORDERED.

UNITED STATES DISTRICT JUDGE

DATE: May 30, 1979

IN THE UNITED STATES DISTRICT COURT

for the Northern District of Texas

Dallas Division

Cause No. CA3-77-1501-F

BENNY B. BARRETT,

versus

CARL THOMAS, Sheriff

ORDER DENYING INTERVENTION

Garry Weber, County Judge of Dallas County, and County Commissioners Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr have filed a motion to intervene in this lawsuit, and for leave to file a Cross Claim against Defendant Carl Thomas. These proposed intervenors also seek to bring in an additional party, Fidelity & Deposit Co. of Maryland, the surety on Carl Thomas' bond.

The proposed intervenors argue that they are concerned that any judgment by Barrett and the class against Carl Thomas may have to be paid from the county treasury, and such payment would impair the Commissioners' ability to see that Dallas County funds are paid as budgeted. They allege in their brief that they have the right to intervene under Federal Rule of Civil Procedure 24(a) because any judgment in this case will impair or impede their ability to protect a claimed interest in county property.

The motion to intervene, the Commissioners contend, is timely because Barrett has been denied relief and the claims of the unnamed class members have not been decided by the Court. Thomas is allegedly not protecting the County's interests in the lawsuit; in, fact, the Commissioners allege that his interests could be adverse to the county if the court determines that Thomas is liable in some manner for a judgment in this case.

Timeliness of the Motion

A motion to intervene must be timely filed. *FMC Corp. v. Keizer Equipment Co.*, 433 F2d 654 (6th Cir. 1970). When examining a motion to intervene, a Court must consider whether or not the applicant was in a position to seek intervention at an earlier stage in the case. *FMC, supra; see Iowa State University Research Foundation Inc. v. Honeywell, Inc.* 459 F.2d 447 (8th Cir. 1972).

In this case the Commissioners have filed a motion to intervene after trial on the liability issues in the lawsuit, and one week prior to the Court's scheduled hearing on the issue of damages. The lawsuit was filed in 1977, two years ago; one year ago this Court entered a preliminary injunction enjoining the Sheriff from enforcing certain rules and regulations. No motion to intervene was filed during this two year period; instead, the Commissioners waited until the eve of judgment to assert their claims, apparently when they awoke to face the possibility that they, rather than Carl Thomas, might ultimately be responsible for paying any judgment imposed in this case. The Commissioners have had ample opportunity at earlier stages of this proceeding to intervene; at present their motion is untimely.

Commissioners cite one case for authority that they have asserted a timely motion to intervene, *United Airlines v.*

McDonald Douglas, 53 L.Ed. 2d 423 (1977). In that case applicants to intervene were putative class members who sought to intervene *for the limited purpose* of appealing the denial of class certification. The District Court refused to certify denial of class certification for interlocutory appeal, and therefore no appeal could be taken until after a final judgment was entered by the Court. *Promptly* after final judgment was entered the putative class members sought to intervene to appeal.

The Supreme Court emphasized in permitting the intervention that the *proper time* to intervene *in that case* was after entry of final judgment; to seek to intervene earlier would have meant that the putative class members would have been spectators to the proceedings until the entry of final judgment.

In this case, however, the Commissioners could have intervened two years ago and would not have been spectators to the proceedings; the issues they seek to raise now could have been argued to the Court, and decided along with the rest of the lawsuit. Now, on the eve of the Court's entry of final judgment, to permit the intervention would mean postponement of the April 2, 1979 hearing, postponement of the entry of judgment, and injection of a new controversy into the lawsuit.

Right to Intervene

The Commissioners appear to be under the false impression that this Court, without the participation of the Commissioners in this lawsuit, will be deciding in its final judgment whether the County of Dallas and the Dallas County Commissioners are liable for any judgment against Carl Thomas in this case. That issue is not now before the Court,

and has never been raised in this case until the Commissioners filed their petition in intervention. The Court, as indicated in its memorandum order, will enter judgment against the Defendant in this case, Carl Thomas, and not against the Commissioners. If Carl Thomas believes, or the Plaintiffs believe, that the Commissioners, or Dallas County, or the Fidelity & Deposit Co. of Maryland is liable for the judgment against Thomas, they are free to request payment and, if denied, file a lawsuit to collect the money they feel is owed to them by those, or any other, entities. Thus, contrary to the Commissioners' assertions, this Court's judgment will not impede or impair the Commissioners' ability to protect any interest they have in this lawsuit.

Adequacy of Thomas's Representation

Where the interest of the intervenor is identical with that of a party, it is presumed that the party will adequately protect the intervenor. *Penick v. Columbus Educational Association*, 574 F.2d 889 (6th Cir. 1978). The interests of the Commissioners and the Sheriff are identical in this lawsuit, with the possible exception that there may be some conflict as to who should pay any judgment. Any dispute about who should pay the judgment should be and can be resolved between the Sheriff and the Commissioners' Court, and should not become, at this late stage, a new issue in this nearly completed case.

Permissive Intervention

Timeliness is required for a petition in intervention under Rule 24(b) and, as discussed earlier, the Commissioners' motion is not timely. There are also no common questions of law or fact; the issues currently before the Court involve

the amount of damages to be assessed, and the issues in the original lawsuit involved whether or not the Sheriff took illegal politically-motivated action against the class. Commissioners do not seek to raise these issues.

Finally, substantial prejudice would occur if the intervention were permitted because the class remedy hearing, which has been set for nearly two months, would have to be postponed, causing considerable delay in this case at a time when the case is nearly concluded.

For the reasons stated, the motion of the Commissioners to intervene is denied.

IT IS SO ORDERED.

United States District Judge

March 29, 1979

U. S. District Court
Northern District of Texas

FILED

Aug. 29, 1980

Joseph McElroy, Jr., Clerk

By Pam Hill
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-79-1032-F

BOBBY JOE SMITH, ET AL.,

vs.

CARL THOMAS, ET AL.

ORDER

All defendants have filed motions for summary judgment. For the reasons set forth below, the Court finds that the motions are meritorious.

I. SECTION 1985 CLAIMS

Although the complaint invokes section 1985, it fails to allege a conspiracy or to include any allegations of racial or class-based animus. Consequently, the complaint is dismissed as it fails to state a claim under that section. *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed 2d 339 (1971).

II. SECTION 1983 CLAIMS

A. *Statute of Limitations.* All defendants have asked for summary judgment against the plaintiff on the ground that

the limitations period bars claims referable to the defendants' acts that allegedly resulted in Mr. Smith's resignation. A claim barred by the applicable statute of limitations may be disposed of by summary judgment. *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653 (5th Cir. 1979). Defendants have sufficiently shown summary judgment evidence to warrant a decision in their favor.

In a section 1983 suit, the Federal Court must look to state law to ascertain the appropriate limitations period. *Ehlers v. City of Decatur*, 614 F.2d 54, 55 (5th Cir. 1980); *Prince v. Wallace*, 568 F.2d 1175 (5th Cir. 1978). Both parties agree that Texas' article 5526, imposing a two-year limitation, applies to actions based on the Civil Rights Statute. Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon, 1958). This suit was filed on August 14, 1979. Accordingly, Plaintiff can assert claims accruing on or after August 14, 1977.

Although the Court must look to state law in selecting the limitations period, it is federal law that governs accrual of a cause of action under § 1983. *Rubin v. O'Koren*, 621 F.2d 114 (5th Cir., 1980); *Lavellee v. Listi*, 611 F.2d 1129, 1130 (5th Cir. 1980). The parties have offered differing dates to arguably trigger the running of the statute. I need not select the date, however, I find that all are without the two-year limitations period.

The general rule is that a cause of action accrues from the date of commission of the wrong. *McGuire v. Baker*, 421 F.2d 895 (5th Cir.), *cert. den.* 400 U.S. 820 (1970). Measuring from the date of the sheriff's wrongful demotion of Mr. Smith in January of 1977, Plaintiff's claim is clearly time-barred.

A second date is arguably proper. This circuit has recently addressed the issue of accrual to conclude that a cause of

action under § 1983 accrues when the plaintiff is aware of both the injury's existence and its connection with the act of the defendant. *Lavellee, supra. See also United States v. Kubrick,* 444 U.S. 111, 62 L.Ed 2d 259 (1979). Accrual under this measurement would occur in July, 1977 when the Plaintiff submitted his resignation, for he then had reason to know of the nature of the injury of which he now complains. The statute bars Plaintiff's claims accruing on this date.

A third accrual date is favored by the Plaintiff as occurring on the date of Mr. Smith's termination. This measurement is arguably proper, under the theory that the injury of discharge is only certain and complete upon actual termination of employment and cessation of performance of services. *Rubin v. O'Koren, supra. See also Bauman v. Centex Corp.,* 611 F.2d 1115 (5th Cir. 1980). Such a measurement, however, does not enhance Mr. Smith's position against the limitations defense. When Mr. Smith tendered his resignation in July, 1977, he specified that the effective date of termination would be August 1, 1977. No evidence suggests that termination occurred after that date. Rather, the Defendants have offered competent evidence that his last active day of work for the Sheriff's Department was well prior to August 14, 1977.

When a movant provides factual support for his summary judgment motion, the opposing party has a duty to respond by setting forth facts showing that there is a genuine issue for trial. *United Steelworkers of America v. University of Alabama,* 599 F.2d 56 (5th Cir. 1979). Mr. Smith has attempted to refute the Defendants' evidence relating to date of his termination by offering a payroll check stub dated August 15, 1977, showing that he received payment for the pay period ending on that date. The Defendants' summary judgment evi-

dence conclusively rebuts any inference otherwise suggested by the check stub as to its significance regarding the date of termination. Mr. Smith turned in all equipment, badges, commissions, uniforms and "Termination Checkout Sheet" on July 25, 1977. He did not actually perform services for the County after that date. *See Player affidavit.* Regulations governing Sheriff's employees provide that the effective date of termination for County employees is the last actual day the employee worked for that body. Any employee may nevertheless be entitled to receive funds at a later date if he is entitled to accrued leave benefits. It is clear that the stub proffered by Mr. Smith reflects such benefits and is no indicia of services performed by Mr. Smith during that pay period. It reflects post-termination payments due to Mr. Smith as a consequence of his separation. It does not call into question the July 25, 1977 date of termination. The fact that Mr. Smith was technically "on the payroll" at a date subsequent to the cessation of his active services will not prolong accrual of his claim. *Cf., Payne v. Crane Co.*, 560 F.2d 198 (5th Cir. 1977). Consequently, because Plaintiff has failed to rebut Defendants' showing with significant probative evidence, he cannot withstand summary judgment on the limitations defense raised regarding his termination. *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111 (5th Cir. 1978); Rule 56(e), *F.R.Civ.P.* Summary judgment on this basis is dispositive of all claims asserted against Sheriff Thomas.

B. *Liability of Commissioners for Failure to Correct Sheriff's Actions.*

The Plaintiff alleged violations by the County of Dallas, and by Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, Dallas County Commissioners. He complains that the

Commissioners ratified his demotion at the hands of the Sheriff by their failure to prevent the action and by their failure to require the Sheriff to reinstate Mr. Smith. For the reasons set forth in § I-A above, these claims are barred by limitations.

In addition, the complaint setting forth these claims does not allege that the Commissioners participated in any way in the demotion. Rather it is viewed fairly as a complaint for their failure to act. As a preliminary matter, I note that these Defendants may not be found liable under § 1983 solely on a theory of respondeat superior. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 56 L.Ed 2d 611 (1978); *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 197 , (on rehearing). Supervisory officials must be personally involved in an activity of their subordinates in order to be liable under the section. Stated otherwise, the Plaintiff must establish some causal connection between an act of the official and the alleged violation. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980); *Henzel v. Gerstein*, 608 F.2d 654 (5th Cir. 1979). Merely claiming that the Defendants had some direction or control over the Sheriff, without an additional showing of the Defendants' active participation in or personal knowledge of the treatment allegedly accorded the Plaintiff, is insufficient. *Perry v. Jones*. 506 F.2d 778 (5th Cir. 1975). The Plaintiff does not allege that the Sheriff's action was taken pursuant to any policies and practices established by these Defendants. *Wanger v. Bonner, supra.*

The core of the Plaintiff's allegations of section 1983 liability for failure to act must rest on a showing that the Defendant's failure to act occurred despite a duty to act, which omission caused the deprivation of the Plaintiff's

federal rights. *Douthit v. Jones*, 619 F.2d (5th Cir., 1980). Summary judgment evidence is clear that not only do these Defendants have no such duty, but they are statutorily barred from influencing or participating in personnel decisions made by officials of separate County offices. *See Tarrant County v. Smith*, 81 S.W.2d 537 (Tex. Civ.App.—Ft. Worth 1935, writ ref'd n.r.e.). The Commissioners are not entrusted with authority to make personnel decisions in the Sheriff's department. *Cf. Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1112 (5th Cir. 1980). Consequently, it is clear that the Commissioners had no duty to prevent the Sheriff's demotion of Mr. Smith. Similarly, they were under no obligation to later reinstate him. The Plaintiff's general argument that the Commissioners are able to influence the Sheriff fails to establish the nexus required between some act of the official and the alleged violation. *Henzel v. Gerstein, supra.*

The remaining claim against these defendants presents a novel but equally unsuccessful ground for liability under section 1983. Plaintiff invokes the Act for the failure of the County and County Commissioners to pay the back pay sum awarded to him in an earlier case in which this court found that Sheriff Thomas had violated the civil rights of the class that included Mr. Smith. *Benny B. Barrett v. Carl Thomas, Sheriff*, CA3-77-1501-F. The decision in Barrett expressly declined to express a view as to the liability, if any, of non-parties for the conduct of the Sheriff. Neither the Commissioners nor the County was a party to that suit.

I do not view section 1983 as broadly as does the Plaintiff. He argues that because the Barrett judgment successfully asserted violations under section 1983, the Defendants' later refusal to pay the awards rendered in that suit is itself

a violation of Plaintiff's rights sufficient to constitute a separate suit under section 1983.

The section provides a cause of action for damages for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any State or Territory." 42 U.S.C. § 1983. *Gomez v. Toledo*, slip op. 79-5601 (U.S. May 27, 1980). Although this section authorizes redress for violations of federal constitutional and statutory rights, *Maine v. Thiboutot*, slip op. 79-838 (U.S. June 25, 1980), it "is not itself a source of substantative rights." *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed.2d 433 (1979). Notwithstanding this statute's broad reach, section 1983 must be viewed as a "method for vindicating federal rights *elsewhere conferred* by those parts of the United States Constitution and federal statutes that it describes." *Id.*, 61 L.Ed.2d at 442. (emphasis added) Plaintiff's bare invocation of a violation of section 1983 without identifying a federal right independent of that section is insufficient to present a claim cognizable under the Act.

Although the Plaintiff's desire to attach liability to these Defendants is not surprising, redress under section 1983 requires more than the occurrence of a perceived wrong. *See Beker Phosphate Corporation v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978). Likewise, the mere fact that the acts are performed by public officials does not elevate a claim into one cognizable under this section. *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir. 1979). The Court will dismiss the claims asserted for defendants' failure to pay the judgment, subject to the plaintiff's amendment of his complaint within ten days of the date of this order to supply the required identification of an independent federal constitutional or statutory right allegedly violated.

III. SECTION 1981 AND FIFTH AMENDMENT CLAIMS

The Defendants have further attacked the Plaintiff's conclusory claims of violation under the fifth amendment and under Section 42 U.S.C. § 1981. For the reasons set forth in Defendants' motion, I find that the complaint fails to state a claim for relief under either of these authorities, and therefore I dismiss these claims.

IV. STANDING OF MRS. SMITH

The complaint includes Mrs. Smith as Plaintiff, but it is silent regarding the nature of her federal claims under any of the sections otherwise invoked. I find that the Defendants' motions to dismiss federal claims asserted by her for failure to state a claim upon which relief can be granted are meritorious, and I hereby dismiss these claims asserted by her.

For the reasons set forth above, and in the event that the Plaintiff fails to amend as permitted in this opinion or the amendment is ineffective to state a claim under section 1983, all remaining state law claims now claiming jurisdiction only as pendent to federal claims otherwise asserted, will be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966).

So ORDERED this 29th day of August, 1980.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-79-1032-F

BOBBY JOE SMITH, ET AL.,

Plaintiffs,

v.

CARL THOMAS, SHERIFF,

Defendants.

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

COMES NOW Bobby Joe Smith and Pauline Smith, plaintiffs herein, and after having been given leave of Court to amend their original complaint in this Court's order of August 29, 1980, say the following:

I. *Jurisdiction*

This action was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and the First, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343(1), (2), (3) and (4) and the aforementioned statutory and constitutional provisions.

II. *Parties*

1) Plaintiff Bobby Joe Smith, was at all times material to this complaint, a citizen of Denton County, Texas. He is currently a resident of Little Elm, Denton County, Texas.

2) Defendant Carl Thomas is and was at all times material hereto the Sheriff of Dallas County, Texas, and was at all times acting in such capacity as the agent, servant and

employee of the defendants, Garry Weber, Jim Jackson, Roy Orr, Nancy Judy, and Jim Tyson, and the County of Dallas. He is sued individually and in his official capacity as Sheriff.

3) Defendants, Jim Jackson, Roy Orr, and Jim Tyson, are and were at all times relevant hereto to the governing officers of the County of Dallas, Texas, and were at all times acting in such official capacities. At the time of the initial incidents alleged herein, defendant Thomas and defendants Jackson, Orr and Tyson held public office as Sheriff and County Commissioners of Dallas County respectively. Defendants Garry Weber and Nancy Judy took office in January, 1979, and by their conduct since that time have ratified and condoned the other defendants' conduct, and have thus become liable therefor.

4) Defendant, County of Dallas, is a governmental entity within the State of Texas and at all times relevant hereto employed the defendants Sheriff and County Commissioners.

5) At all times material hereto all the defendants were acting under the color of state law and under the color of their authority as Sheriff and County Commissioners of the County of Dallas.

III. *Cause of Action Under 42 U.S.C. § 1983 Against Defendant Thomas*

1) On or about January of 1977 the defendant Carl Thomas acting in his individual and official capacity as Sheriff of Dallas County, Texas, demoted your plaintiff, Bobby Joe Smith, from his previous position as Sergeant, to the position of Jailer, because of Smith's political affiliation and belief, in violation of the First Amendment of the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

2) This fact (in [1] above) has been judicially established against defendant Thomas in *Benny B. Barrett v. Carl Thomas, Sheriff*, Cause No. CA-3-77-1501-F and he is collaterally estopped from denying it.

3) As a result of the actions of the defendant Thomas, acting individually, and within his official capacity, plaintiff suffered a severe depression, resulting in hospitalization, and resulting in his being forced to resign his position with the Dallas County Sheriff's Department, effective August 15, 1977.

4) As a result of the conduct of the defendant Thomas, acting individually and within his official capacity, your plaintiff Bobby Joe Smith has suffered serious and permanent psychological harm; lost wages; permanent damage to his earning capacity; past and future, medical and psychiatric expenses; and mental anguish and humiliation; for all of which he brings suit in this case in the amount of $250,000 actual and $250,000 punitive damages.

IV. *First Cause of Action Against Defendant County Commissioners and the County of Dallas Under 42 U.S.C. § 1983 and the First, Fifth and Fourteenth Amendments to the United States Constitution*

1) On or about May 30, 1979, judgment was entered by the United States District Court for the Northern District of Texas in Civil Action No. CA-3-77-1501-F against the Sheriff of Dallas County in his official capacity, and in favor of plaintiff Smith, and the class he is a member of, for backpay and costs, including attorney's fees.

2) By virtue of that judgment, plaintiff Bobby Joe Smith became entitled to backpay in the amount of $29,000, plus

interest, together with costs and attorney's fees, because of the illegal and unconstitutional conduct of the defendant Thomas, whose edicts regarding the Sheriff's Department represent official Dallas County policy.

3) At the time and on the occasion in question, the defendant Thomas was the only person who had the legal authority to act for the County of Dallas regarding personnel decisions of demotion and discharge in the Sheriff's Department, which were found to be illegal under the above judgment, thus rendering the defendant Thomas and the County of Dallas, liable pursuant to 42 U.S.C. § 1983.

4) On September 19, 1979, said judgment became final and subject to execution.

5) Said judgment was presented to the Auditor, County Judge and Commissioners Court of Dallas County, Texas, for payment.

6) Notwithstanding the fact that said Commissioners and said Auditor were obligated, as a matter of law, to automatically pay said judgment, since such judgment constituted a judgment against the County of Dallas under 42 U.S.C. § 1983, said defendants wilfully and wrongfully refused to pay said judgment in violation of rights guaranteed to the plaintiff Smith by the Constitution and the law and in violation of 42 U.S.C. § 1983.

Second Cause of Action Against Defendant County Commissioners and the County of Dallas Under 42 U.S.C. § 1983 and the First, Fifth and Fourteenth Amendments to the United States Constitution

1) Plaintiff incorporates all of the allegations of paragraph IV by reference into this paragraph.

2) In addition, plaintiff alleges that the defendant Commissioners individually and in their official capacities, jointly and severally made a policy decision to deny the claims of plaintiff and the class he represents for backpay and attorney's fees, even though they knew that as a matter of law, under the decision of the Supreme Court of the United States in *Monell v. Dept. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 Sup.Ct. 2018 (1978), that the Supreme Court of the United States had specifically held that a decision by a local governmental official constitutes governmental action, where the decision is "made by . . . lawmakers or *by those whose edicts or acts may fairly be said to represent official policy . . . .*" (emphasis added) *Monell v. Dept. of Social Services, supra*, 98 Sup.Ct. 2018, 2038 (1978). Further, defendants also knew that state law and the Constitution of the State of Texas require them to pay the salaries of deputies, and ignored this duty under state law.

3) Thus, the defendants, acting jointly and severally, and individually and in their official capacities, directly and proximately aggravated and worsened the injuries already inflicted on plaintiff by the defendant Thomas, and thereby rendered themselves jointly and severally liable for Thomas' wrongs, individually and officially, by violating their duty under 42 U.S.C. § 1983, as pronounced by the United States Supreme Court in *Monell, supra*, the violation of which duty was a direct factual cause of the aggravation and worsening of plaintiff Smith's injuries.

WHEREFORE, plaintiff prays for the following relief:

1) Issuance of further process, if any, as required by law;

2) Advancement of this cause upon the docket and upon hearing;

3) The entry of a judgment declaring that the defendants are individually and officially liable pursuant to 42 U.S.C. § 1983 and/or the First, Fifth and Fourteenth Amendments to the United States Constitution to plaintiff for his damages, attorney's fee and backpay as a result of this Court's judgment against the Sheriff of Dallas County, and in his official capacity, in Civil Action No. 3-77-1501-F, and ordering the defendants to pay said judgment, in the event this Court does not grant plaintiff's motion to non-suit this cause of action, which is being filed simultaneously herewith;

4) To award plaintiff his damages to compensate him against the defendants in their individual capacities to compensate him for his loss of the value of his judgment, and for his other damages suffered directly and proximately as a result of their wrongful conduct in refusing to pay his backpay, as hereinbefore alleged, including costs and attorney's fees for all unsuccessful appeals by defendants, and of this suit;

5) And finally, to award said reasonable attorney's fees to plaintiff's attorneys, Law Offices of James C. Barber.

Respectfully submitted,

LAW OFFICES OF JAMES C. BARBER
5217 Ross Avenue, Suite 318
Dallas, Texas 75206
(214) 821-8840

By: _____
James C. Barber
Attorney for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this amended complaint has been mailed to Mr. Baldree, attorney for defendant Thomas, and to Mr. Luna, attorney for defendants Commissioners and County of Dallas, on this the 9th day of September, 1980.

James C. Barber

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-79-1032-F

BOBBY JOE SMITH, ET AL.,

vs.

CARL THOMAS, ET AL.

ORDER OF DISMISSAL

Came on before the Court the motion of Plaintiff Bobby Joe Smith "For Non-Suit of Certain Claims and To Dismiss Others with Prejudice" and the Court having considered the motion, briefs, and Defendant's response thereto is of the opinion that Plaintiff's motion should be denied in all respects. On August 29, 1980 this Court issued an Order with respect to all of the Defendants' motions for summary judgment. In that Order, the Court dismissed all of Plaintiff's federal claims with prejudice with the exception of Plaintiff's claims against the County Commissioners predicated on their alleged failure to pay the back pay sum awarded to the Plaintiff in an earlier case. As to that claim the Court stated that it would dismiss the claim subject to Plaintiff's amendment of his complaint "to supply the required identification of an independent federal constitutional or statutory right allegedly violated." Plaintiff subsequently filed an amended complaint. The Court is of the opinion that the complaint

as amended still fails to state a cause of action under 42 U.S.C. § 1983.

Plaintiff's First Amended Complaint does not differ materially from the original complaint filed in this action. Plaintiff asserts that the failure of the County Commissioners to pay a judgment entered by this Court in favor of the Plaintiff against Sheriff Carl Thomas creates a cause of action under 42 U.S.C. § 1983. This position was refuted by this Court's order of August 29, 1980. Plaintiff urges that a recent Fifth Circuit Court of Appeals case, *Familias Unidas v. Briscoe*, 619 F. 2d 391, 404 (5th Cir. 1980) supports his position. The Court in *Briscoe* held that where an official is alone the final authority or ultimate repository of County power, his official conduct and decisions must necessarily be considered those of "one whose edicts or acts may be fairly said to represent official policy" for which the County may be held liable under section 1983. That holding is inapplicable in the case at bar. At the time of its ruling and judgment in the *Barrett v. Thomas* (CA3-77-1501-F) cause, this Court expressed no opinion as to the liability of the County for the acts of the Sheriff. The County had not been named as a party. Hence, to date there is no legally binding judgment which the county is required to answer to. Plaintiff has carefully limited the source of his alleged cause of action to the failure of the Commissioners to pay the judgment. The Court agrees that had Plaintiff named the County as a party in the *Barrett* action and proven the requisite facts under the *Briscoe* decision, Plaintiff would be entitled to recover of the County. Plaintiff did not do so, however, and the Court is of the opinion that the County's failure to pay a judgment rendered against a different party does not create a cause of action under 42 U.S.C. § 1983. Therefore,

It is ORDERED that Plaintiff's Motion "For Non-Suit of Certain Claims and to Dismiss Others with Prejudice" is DENIED in all respects,

It is further ORDERED that all 42 U.S.C. §§ 1981, 1983 and 1985 claims asserted by Bobby Joe Smith and Mrs. Smith are dismissed with prejudice,

It is further ORDERED that all Fifth Amendment claims asserted by Bobby Joe Smith and Mrs. Smith are dismissed with prejudice pursuant to this Court's order of August 29, 1980,

It is further ORDERED that all remaining state law claims asserted under the doctrine of pendent jurisdiction are dismissed without prejudice.

So ORDERED this 19th day of January, 1981.

United States District Judge

ARTICLE 5, SECTION 18, TEXAS CONSTITUTION

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

ARTICLE 6869, V.A.T.S.

Art. 6869. [7125] [4896] May appoint deputies, etc.

Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of

their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the official oath, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the County Clerk and deposited in said office. The number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the Justice precinct in which is located the county site of such county, and one in each Justice precinct, and a list of these appointments shall be posted up in a conspicuous place in the Clerk's office. An indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff. Provided further, that if in the opinion of the Commissioners' Court fees of the sheriff's office are not sufficient to justify the payment of salaries of such deputies, the Commissioners' Court shall have the power to pay the same out of the General Fund of said county. Acts 1889, p. 23; G.L. vol. 9, p. 1051; Acts 1929, 41st Leg., 1st C.S., p. 283, ch. 113, § 1.

ARTICLE 1573, V.A.T.S.

Art. 1573. [1366] [790] [677] Suits against

No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the commissioners court for allowance, and such court shall have neglected or refused to audit and allow the same, or any part thereof. P.D. 1045.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law

92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other

such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

RULES OF CIVIL PROCEDURE

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 52. Findings by the Court

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reasosn not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

U. S. DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS
FILED
June 25, 1979
Joseph McElroy, Jr., Clerk
By Pam HILL
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Cause No. CA3-77-1501-F

BENNY B. BARRETT

v.

CARL THOMAS, SHERIFF

ORDER

The court has considered the motion for new trial filed by the defendant. The court felt that is was improper to consider evidence on liability after trial, although it was clearly appropriate to consider evidence on the amount of back pay to which Masters and Smith were entitled, and this was the type of evidence considered by the Court in determining that their back pay should continue to the present time. The court's findings concerning whether Masters was forced to resign related to the issue of back pay. The jury determined liability; the court had to consider certain evidence to determine the extent of the remedy. The same analysis applies to the court's consideration of Smith's relief due under the judgment.

The court was also trying to state in footnotes 3 and 4 that these findings also applied to the issue of liability in the event the Fifth Circuit held that the court could consider additional evidence on liability after receipt of the jury verdict. Defendant had apparently been arguing that the court could hear additional evidence on the liability question at the remedy hearing.

The court did not believe and still does not believe that the Defendant's position is a correct statement of the law, but if the court erred in that determination, it took into account the evidence on Masters and Smith presented at the remedy hearing, considered that evidence on liability in footnotes 3 and 4, and still concluded that Masters and Smith prevailed on the issue of liability and on the issue of back pay to date.

For the reasons stated, the Defendant's motion for new trial is denied.

IT IS SO ORDERED.

United States District Court

Date: June 25, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-77-1501-F

BENNY B. BARRETT,

v.

CARL THOMAS, Sheriff,

NOTICE OF APPEAL

Notice is hereby given that Plaintiff above-named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of Judge Robert Porter entered August 29, 1979, denying Plaintiff's Motion to Tax Attorney's Fees and Costs Against County Funds and for Writ of Execution and/or Other Necessary Orders.

DATED: September 5, 1979.

Respectfully submitted,

LAW OFFICES OF JAMES C. BARBER
318 Merchants State Bank Building
5217 Ross Avenue
Dallas, Texas 75206
214/821-8840

By: .....
James C. Barber

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal has been mailed to Ms. Sue Lagarde, attorney for Defendant and to Mr. Earl Luna, attorney for Dallas County Commissioners' Court, on this the 5th day of September, 1979.

_____

James C. Barber

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-77-1501-F

BENNY B. BARRETT,

Plaintiff,

vs.

CARL THOMAS, SHERIFF,

Defendant.

AMENDED NOTICE OF APPEAL

Notice is hereby given that plaintiff above-named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the orders of Judge Robert Porter entered August 29, 1979 and September 6, 1979, denying Plaintiff's Motion to Tax Attorney's Fees and Costs Against County Funds and for Writ of Execution and/or Other Necessary Orders, and granting defendant a stay pending an appeal to the emergency panel of the Fifth Circuit.

DATED: September 12, 1979.

Respectfully submitted,

LAW OFFICES OF JAMES C. BARBER
5217 Ross Avenue, Suite 318
Dallas, Texas 75206
(214) 821-8840

By: JAMES C. BARBER
James C. Barber
Attorney for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this amended notice of appeal has been mailed to Mr. W. C. Davis, attorney for defendant, and to Mr. Earl Luna, attorney for Dallas County Commissioners Court, on this the 12th day of September, 1979.

JAMES C. BARBER

James C. Barber

(PAGES FROM BRIEF OF APPELLEE BENNY B. BARRETT IN APPEAL NO. 3021, COURT OF APPEALS FOR THE FIFTH CIRCUIT)

No. 79-3021

BENNY B. BARRETT,
Plaintiff-Appellee,

v.

CARL THOMAS, SHERIFF,
Defendant-Appellant

BRIEF OF APPELLEE

TO THE HONORABLE COURT OF APPEALS:

Now comes Benny B. Barrett, Appellee in the above numbered and styled cause and files this, his brief and would respectfully show the court the following:

STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY HELD THE SHERIFF'S DEPARTMENT CODE OF CONDUCT SECTIONS IN ISSUE, SECTIONS 12 AND 15, AND THE SHERIFF'S GENERAL RULES ONE AND TWO, TO BE UNCONSTTTUTIONAL, ON THEIR FACE AND AS APPLIED TO APPELLEE, AND PROPERLY PERMANENTLY ENJOINED THEIR ENFORCEMENT.

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE APPLICABLE LEGAL STANDARD REGARDING PROHIBITED POLITICAL DISCRIMINATION BY THE APPELLANT, AND PROPERLY GRANTED JUDGMENT AND RELIEF ON THE JURY VERDICT FOR THE PLAINTIFF AND THE CLASS IN THE PROPER KIND AND AMOUNT.

III. THE DEFENSE OF QUALIFIED IMMUNITY WAS NOT PLEADED, PROVED OR TRIED IN THE TRIAL OF THIS CASE, AND EVEN IF APPLICABLE TO THE FACTS OF THIS CASE, WHICH IS NOT ADMITTED, IT WAS WAIVED BY THE APPELLANT.

IV. THE TRIAL COURT PROPERLY GRANTED PLAINTIFF AND THE CLASS ATTORNEYS' FEES IN THIS CASE UNDER 42 U.S.C. §1988, AND THE AMOUNT WAS REASONABLE, ALTHOUGH THE TRIAL COURT ERRED IN HOLDING THAT SUCH FEES WERE NOT RECOVERABLE AGAINST THE COMMISSIONERS' COURT AND THE COUNTY OF DALLAS. FURTHER, ANY ISSUE ABOUT THE PROPRIETY OF THE ATTORNEYS' FEE AWARD WAS WAIVED BY THE APPELLANT BY FAILURE TO RAISE IT IN THE TRIAL COURT.

STATEMENT OF THE CASE

(1) *Jurisdiction*

Jurisdiction is undisputed in this case under 28 USC §§1331, 1343, this being a suit in equity and for damages authorized under 42 USC §§1983. Jurisdiction is also proper under 28 USC §§2201, 2202.

(2) *Statement of the Course of Proceedings and Disposition in the Trial Court.*

Appellee Benny B. Barrett, a former Deputy Sheriff of Dallas, County, brought this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on November 14, 1977. (R 1-9). Barrett alleged that the appellant Thomas, acting under

official was absolutely immune from a defamation action, and could not as a matter of law violate freedom of speech of someone else anyway. As to the demotion claim in the case, this Court held that administrative exhaustion had not been completed, so there was no need for the application of a damages remedy.

The whole claim of immunity is typical of the character of this appeal. Either the appellant has raised issues that were not raised in the trial court, or he has called for interpretations of authorities that stretch the limits of advocacy. This appeal is indeed a waste of the time and resources of the attorneys and this Court.

IV. THE TRIAL COURT PROPERLY GRANTED PLAINTIFF AND THE CLASS ATTORNEYS' FEES IN THIS CASE UNDER 42 U.S.C. SECTION 1988, AND THE AMOUNT WAS REASONABLE, ALTHOUGH THE TRIAL COURT ERRED IN HOLDING THAT SUCH FEES WERE NOT RECOVERABLE AGAINST THE COMMISSIONERS' COURT AND THE COUNTY OF DALLAS. FURTHER, ANY ISSUE ABOUT THE PROPRIETY OF THE ATTORNEYS' FEE AWARD WAS WAIVED BY THE APPELLANT BY FAILURE TO RAISE IT IN THE TRIAL COURT.

The claims by appellant under his issue VI (brief, pg. 42) are an affront to this Court. To suggest that a violation of First Amendment rights by a county official is not a violation of 42 USC sec. 1983 does not merit reply. However, appellant should read *Hague v. CIO*, 307 U.S. 496 (1939). The other arguments are equally meritless. The fact that

attorneys' fees might be substantial is immaterial. "Ancillary" costs may be large indeed. In *Milliken v. Bradley* 433 U. S. 267 (1977), the Supreme Court approved an order requiring the state to pay $6 million to defray the costs of desegregation. It is difficult to follow appellant's argument that because he might be entitled to qualified immunity, he shouldn't owe attorneys' fees. It is clear that attorneys' fees are costs, and costs have always been recoverable against the losing party, even in the face of an Eleventh Amendment immunity claim. *Fcirmont Creamery Co. v. Minnesota*, 275 U. S. 70 (1926). It is also clear that appellee and the class are prevailing parties in this case, and thus entitled to attorneys' fees under 42 USC Sec. 1988. *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977); *Howard v. Phelps*, 443 F.Supp. 374 (..... 1978). Moreover, it would be an abuse of the court's discretion *not* to award them, absent special circumstances justifying such action, and none exist here. *McCormick v. Attala Cty. Bd. of Educ.*, 424 F.Supp. 1382 (D.C.N.D. Miss. 1976)

As to the amount of the fees, the Senate Report on 42 USC Sec. 1988 says that the amount of the award is to be governed "by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases", and should not be reduced because the rights involved may be nonpecuniary in nature. Sen. Rep. N. 94-1011, 5 U.S. Code Cong. & Admin. News 1976.

The only thing improper about the trial court's judgment regarding attorneys' fees is the court's failure to award them against the County of Dallas and the County Commissioners. This order of the court was appealed by appellee (2nd Supp. R2). This point was briefed in the brief of appellee in Appeal No. 79-2183, a companion case to this appeal, and those arguments have previously been incorporated in this appeal.

They are based on *Hutto v. Finney*, 98 S.Ct. 2565 (1978), but even before *Hutto*, this Court had held that such fees were recoverable from the governmental entity. *Rainey v. Jackson State College*, 551 F.2d 671 (5th Cir. 1977). Other cases so holding since *Hutto* are collected in our brief in 79-2183 at pp. 23-30. *See also* brief of appellee in *Collins, et al v. Thomas, et al*, Appeal No. 79-3360, also a companion appeal, arising out of appellant's wrongful termination of a witness in the present case and his associates.

CONCLUSION

It is respectfully prayed that this Court affirm this judgment as to the appellee and the class, but reverse the trial court's judgment regarding recoverability of attorneys' fees from the County of Dallas and grant appellee and the class costs, expenses, and reasonable attorneys' fees on this appeal.

Respectfully submitted,

LAW OFFICES OF JAMES C. BARBER
318 Merchants State Bank Building
5217 Ross Avenue
Dallas, Texas 75206
(214) 821-8840

James C. Barber
Attorney for Appellee

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Brief of Appellee has been mailed to Mr. Charles J. Baldree, attorney for appellant, on this the 24 day of January, 1980.

James C. Barber

the Fifth Circuit into a trial court and to have the Fifth Circuit pass on an issue not heard below.

The jurisdiction of the courts of appeals is controlled by 28 U.S.C. 1291 which states, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

By its very terms the statute investing the courts of appeals with jurisdiction limits that jurisdiction to appeals from *final decisions* of district courts. The existence of a final decision prior to appeal is a jurisdictional prerequisite to the maintenance of the appeal. *See Abney v. U.S.*, 431 U.S. 651 (1977); *Dunlop v. Ledot's Foodliner of Larose, Inc.*, 509 F.2d 1387 (5th Cir. 1975) and *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (5th Cir. 1974). In this case, the District Court did not enter an order, final or otherwise, deciding the county's liability under the judgment. In the absence of such an order, there is nothing to give the Court of Appeals jurisdiction. *(See* trial court's judgment of May 30, 1979, p. 5 and order of August 29, 1979)

This conclusion would follow even if appellants had been allowed to intervene. Even a party could not appeal from a non-determination, particularly one which had not been pleaded or litigated. The correct procedure in such a case would be to move for judgment one way or the other pursuant

LAW OFFICES OF JAMES C. BARBER
318 MERCHANTS STATE BANK BUILDING
5217 ROSS AVENUE
DALLAS, TEXAS 75206

November 10, 1980

Mr. Gilbert F. Ganucheau, Clerk
U. S. Court of Appeals — Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 79-3021; Benny B. Barrett v. Carl Thomas

Dear Mr. Ganucheau:

In reply to Mr. Luna's letter of November 5, 1980, I offer the following. He is correct that we sought attorney's fees in the subsequent suit against the commissioners, but the primary thrust of that suit is for backpay. My representation to the Court that we were not seeking attorney's fees was an inadvertence.

However, that suit is merely a backstop on the attorney's fee issue, as we have contended all along, and contend in the appeal before this Court, that attorney's fees are recoverable against Dallas County and the Commissioners Court without regard to their presence in that suit.

Our position on these issues is more fully explicated in the supplemental brief we have just filed. Thank you for calling this to the attention of the Court.

Sincerely yours,

James C. Barber

JCB:et
cc: Mr. Earl Luna
cc: Ms. Sue Lagarde
cc: Mr. Benny Barrett

Amicus Brief

1

MOTION FILED
DEC 28 1981

No. 81-989

In The

Supreme Court of the United States

OCTOBER TERM, 1981

DALLAS COUNTY, TEXAS, ET AL., *Petitioners,*

v.

CARL THOMAS, *Petitioner,*

v.

BENNY B. BARRETT, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, AND BRIEF IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, THE COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, a Texas non-profit corporation (hereinafter referred to as "*Amicus Curiae*"), and respectfully requests leave of the Court to file an *amicus* brief in support of Petitioners', Dallas County, et al., Application for Writ of Certiorari; and, as grounds therefor, would respectfully show as follows:

I.

Amicus curiae is a statewide association of Texas State Constitutional officers (i.e., county judges and commissioners) who serve as members of the governing bodies (i.e., county commissioners' courts) of State agencies (i.e., counties.) TEX. CONST. art. v, § 18. As such officers, the members of *amicus* are charged with the responsibility of providing funds to satisfy any liabilities on the part of their respective agencies which might arise under the decision of the Court of Appeals or, should certiorari be granted, under the decision of this Court in this case. TEX. REV. CIV. STAT. ANN. art. 689a-11 (Vernon 1964). Accordingly, the interests of *amicus* reflect the interests of the 254 Texas county governments and the fiscal interests of the more than 14 million persons who reside in these counties all across the State of Texas.

II.

Amicus seeks leave of Court to file its brief in support of the Petition for Certiorari in this case for two reasons. First, *amicus* believes that two of the questions of law raised by Petitioners, Dallas County, et al., are extremely critical in this rapidly developing area of federal law. These questions concern (1) the capacity of a Texas county-level officer to serve as a surrogate litigant for his county, and (2) the scope of liability that a Texas county may incur under 42 U.S.C. § 1983 as the result of conduct of officials who, under clearly established Texas law, are State officers, as well

as associated Eleventh Amendment problems. Both of these issues present questions of first impression for this Court. Neither this Court nor any Court of Appeals has addressed the relation of Rule 17(b) of the Federal Rules of Civil Procedure to actions brought in federal court under § 1983 against government officers "in their official capacity" or otherwise. Likewise, this Court has never addressed the special problems presented in cases involving local governments whose operating structures, as conceded by the Fifth Circuit, are "unique." *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

Unless *amicus*, whose proposed brief focuses exclusively on these two crucial questions, is granted leave to file its brief, however, this Court will have to decide whether to accept this case for review on the basis of the Petitioners' Brief for Certiorari. Petitioner's brief, though ably written, is forced to address four grounds of error in but twenty-one pages of actual argument. *Amicus* respectfully submits that this Court would profit from granting *amicus* leave to file its brief so that the Court can have the benefit of extended argument on the novel and important issues raised by this case before a decision is made on the question of whether review should be granted.

III.

The second reason that this Court should grant this Motion for Leave is because the questions of governmental liability which rest at the very core of this case are inevitably intertwined with the welfare of the public fisc. Courts have

traditionally been especially sensitive to this concern, and this sensitivity has manifested itself in a greater willingness to permit the appearance of *amici curiae* in cases involving such issues. This attitude was well expressed by the Fourth Circuit Court of Appeals in a case in which an *amicus curiae* sought leave in order to dispute the validity of certain notes (scrip) issued by a state government. The Court of Appeals stated:

> The question [presented] ... affects every taxpayer in the state. If this scrip be receivable for taxes, the debt of the state will largely be increased. Although this suit would have an immediate effect only on the parties in this case, still it may decide the general question, and so anticipate a final decision. The affidavits and arguments of the *amicus curiae* have been admitted and have received careful attention.

Robinson v. Lee, 122 F. 1010, 1011 (4th Cir. 1903), *aff'd.*, 196 U.S. 64 (1904).

The case at bar, no less than the *Robinson* case, also "affects every taxpayer in the state" of Texas. When a local government is held liable under § 1983 for the conduct of its officers and employees, it is the taxpayer who suffers. The significance of the impact of the Court of Appeals' decision, therefore, should allow this Motion to be favorably received by the Court so that it might receive additional information, useful to the Court in its decision on the question of certiorari, on the issues presented in this case which are fundamentally based upon the peculiarities of Texas law. *See, New England Patriots Football Club, Inc. v. University*

of Colorado, 592 F.2d 1196 (1st Cir. 1979) (function of *amicus* is to give information to the Court on some matter of law on which it might be uncertain); *accord*, *The Claveresk*, 264 F. 276 (2d Cir. 1920).

WHEREFORE, PREMISES CONSIDERED, *amicus* prays that its Motion for Leave to File Brief of *Amicus Curiae* be granted and that the Court accept for filing *Amicus'* Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS

No. 81-989

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, a Texas nonprofit corporation (hereinafter referred to as "*Amicus Curiae*"), and files this, its Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari; and would respectfully show as follows:

INTEREST OF AMICUS CURIAE

Amicus curiae is a statewide association of Texas State Constitutional officers (i.e., county judges and commissioners) who serve as members of the governing bodies (i.e., county commissioners' courts) of State agencies (i.e., counties). TEX. CONST. art. V, § 18. As such officers, the members of *amicus* are charged with the responsibility of providing funds to satisfy any liabilities on the part of their respective agencies which might arise under the decision of the Court of Appeals or, should certiorari be granted, under the decision of this Court in this case. TEX. REV. CIV. STAT. ANN. art. 689a-11 (Vernon 1964).

The interest of *amicus* and its members, therefore, is the desire that the taxpayers of Texas counties not be held liable as the result of conduct of state officers over whom neither they nor their respective counties have any control.

This Brief demonstrates that the law already recognizes the legal principles behind this interest. While not directly adopting the statement of issues made by Petitioners, Dallas County, et al., this Brief supports the principles embraced by Petitioners' Issues No. II and IV. Petitioners' Brief for Certiorari at i.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case presented by Petitioners, Dallas County, et al., in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

I.

Under Federal Law, Carl Thomas' and Dallas County's Capacity To Be Sued Is Determined by Texas Law. Rule

17(b), Federal Rules of Civil Procedure, states that whether an individual defendant may be sued in a particular capacity shall be determined by the law of his domicile. This same Rule provides that the capacity of a governmental entity to be sued shall be determined by the law of the State in which the District Court sits. Since Sheriff Carl Thomas is a Texas domiciliary, and Dallas County is a division of the State of Texas, Texas law governs the issue of the defendant's capacity to be sued in this action.

Under Texas law, Carl Thomas Is Incapable of Serving as a Surrogate Defendant for Dallas County. The Fifth Circuit treated this action against "Carl Thomas, Sheriff" as one against Dallas County itself. The Texas Rules of Civil Procedure, adopted in this instance as surrogate federal law by the Federal Rules of Civil Procedure, prescribe that a suit against a Texas County must be brought directly against the county in its own name. A county-level officer in Texas is thus incapable of serving as the alter ego of his county in litigation brought against the county's interests.

Under Federal Law, the Plaintiffs' Pleadings Fail To State a Claim Against Dallas County. The Federal Rules of Civil Procedure require plaintiffs to plead "a short and plain statement" of their claims sufficient to give the defendant "fair notice" of what the plaintiffs' claim is and the grounds upon which it rests. The plaintiffs in the instant case failed to comply with this requirement with respect to Dallas County. There was absolutely no pleading whatever linking Dallas County, as distinguished from Carl Thomas, to any ground of liability to the plaintiffs.

II.

Texas Sheriffs Are State, Not County, Officers. Well established Texas law holds squarely that a County Sheriff

is not an officer of a county, but of the State of Texas itself. As an independently elected officer, all of his duties, powers and authority emanate from State, not local, law.

Texas Counties Are But Arms of the State and Do Not Come Within the Scope of § 1983 Liability of Local Governments As Defined in *Monell*. State law flatly holds Texas counties to be but mere local administrative units of the State of Texas. This principle has been recognized by federal courts and has already been used to grant Eleventh Amendment immunity status to these units of government. The scope of § 1983 liability for municipalities annotated by this Court in *Monell v. Department of Social Services*, by its own express limitations, therefore does not apply to Texas counties.

If Any Government Is Responsible to the Plaintiffs, It Should Be the Entire State of Texas, Not Dallas County. The official policy of the State of Texas allowed Carl Thomas to make the personnel decisions challenged in the case at bar. Dallas County had absolutely no control over Sheriff Thomas' actions. Federal decisions, including authority decided by this Court, hold that Dallas County should not bear responsibility under these circumstances and that, if any governmental entity should be held accountable to the plaintiffs for Carl Thomas' conduct, it should be the entire State of Texas.

ARGUMENT

I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT.

A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY

AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW.

Without reference to the Federal Rules of Civil Procedure, the Fifth Circuit in this case held for the first time that where a county-level officer of a Texas county is named as a party defendant, a judgment against that defendant may be satisfied with funds possessed by the county even though it was not named a defendant in the action. Thus, the Court of Appeals impliedly held that a county-level officer has the capacity to act as a surrogate litigant on behalf of his county and/or that a Texas county has the capacity to be sued through one of its officers. The Court necessarily made this implied holding on the issue of capacity, since "[g]enerally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and, typically, is determined without regard to the particular claim or defense being asserted." 6 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1559, at 727-28 (1971). In the case at bar, the Fifth Circuit implicitly determined that Sheriff Carl Thomas possessed sufficient "personal qualifications" "to litigate" on behalf of Dallas County, as well as himself.

This determination was simply wrong. Rule 17(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the District Court is held . . .

FED. R. CIV. P. 17(b). Applying this rule to the instant case, one need look only to Texas law, since Texas is both the domicile of Sheriff Thomas and the State in which the District Court sat. State law must determine whether a governmental officer within that state has the capacity to serve as a surrogate litigant for his governmental entity in a federal court action. *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) (per Rives, Circuit Judge). Moreover, Rule 17(b) has been employed routinely to resolve issues of capacity in civil rights actions by adoption of applicable state law. *See, e.g., Lombardi v. Peace*, 259 F.Supp. 222 (S.D. N.Y. 1966).

B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT.

When one looks to Texas law to determine whether an action may be maintained against a county through a lawsuit filed against one or more county-level officers, the answer is clear. Rule 33 of the Texas Rules of Civil Procedure flatly states, "Suits by or against a county or incorporated city, town or village shall be in its corporate name." TEX. R. CIV. P. 33. This rule of Texas procedure is firmly embedded and has been invoked repeatedly by Texas Courts to deny plaintiffs relief against a county where the suit was maintained only against county-level officers. *See, e.g., Scott v. Graham*, 156 Tex. 97, 292 S.W.2d 324 (1956); *Childress County v. Sachse*, 310 S.W.2d 414 (Tex. Civ. App.—Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371, 312 S.W.2d 380); *Davis v. Wildenthal*, 241 S.W.2d 620 (Tex. Civ. App.—El Paso 1951, writ ref'd. n.r.e.). Accordingly, the Court of Appeals erred when it overlooked Federal Rule 17(b) and Texas Rule 33 and reversed the District Court's denial of an

award of attorneys' fees against Dallas County.[1]

[1] Although *amicus* notes that this Court has previously held that a governmental entity entitled to claim Eleventh Amendment immunity may not be sued directly in its own name in federal court, *see, e.g., Quern v. Jordan,* 440 U.S. 332 (1979); and *Alabama v. Pugh,* 438 U.S. 781 (1978), *amicus* submits that Rule 33 of the Texas Rules of Civil Procedure does not indicate that Texas counties are not entitled to this constitutional defense or that the State of Texas has consented to suits against its counties in federal court, thereby waiving the Eleventh Amendment defense.

Amicus submits that, under the criteria established by this Court and lower federal courts, Texas counties may properly claim Eleventh Amendment protection. *See Doe v. Sullivan,* 472 F.Supp. 975 (W.D. Tex. 1979); *compare, Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977). The Fifth Circuit itself has indicated that such protection may indeed be appropriate. *Van Ooteghem v. Gray,* 654 F.2d 304 (5th Cir. 1981) (en banc).

Rule 33, requiring suits against Texas counties to be brought against the governmental body itself, is a procedural rule promulgated for use in Texas courts by the Texas Supreme Court. A *procedural* rule fashioned by a court for use in state courts should not be deemed as a waiver of a *substantive* defense available in federal court. Indeed, Rule 17(b) is a procedural rule and cannot be construed, even by its adoption of a state procedural rule, to effect, abridge or modify the substantive rights of Dallas County under the Eleventh Amendment. *John R. Alley & Co., Inc. v. Federal National Bank,* 124 F.2d 995 (10th Cir. 1942). But even if Rule 17(b) could be construed as permitting an interpretation that Rule 33 of the Texas Rules had impliedly waived a county's Eleventh Amendment protection, it must be remembered that implied waivers of Eleventh Amendment protection are not favored. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959); *see also* cases cited in 13 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3524 at 79, n. 14 (1975). Of course, the applicability of this constitutional defense is not directly before the Court in the instant case, inasmuch as Dallas County, in a proper case, could be held liable for payment of a prevailing plaintiff's attorney's fees, notwithstanding the Eleventh Amendment. *Hutto v. Finney,* 437 U.S. 678 (1978).

Amicus respectfully submits that a remand of this case to the Court of Appeals to decide these interrelated issues of capacity and constitutional immunity may be desirable so that this Court can have the benefit of the Fifth Circuit's views on these issues, which are necessarily dependent upon the intricacies of Texas law. *See, e.g., Wise v. Lipscomb,* 437 U.S. 535 (1978); *Dandridge v. Williams,* 397 U.S. 471, 475, n. 6 (1970); *Aetna Casualty & Surety Company v. Flowers,* 330 U.S. 464, 468 (1947); *United States v. Ballard,* 322 U.S. 78, 88 (1944).

C. *MONELL* AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE.

It might be contended that this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), impliedly held that Rule 17(b) does not apply in civil rights actions against government officers who are named as defendants "in their official capacities." It could be argued that, in *Monell*, where there were individual defendants who had been sued in their "official capacities," the Court impliedly held that a government officer, when sued in such a capacity, *always* has the "capacity" to represent the interests of his government as a surrogate litigant, "at least where Eleventh Amendment considerations do not control analysis." *Monell v. Department of Social Services, supra*, at 690, n. 55.

Such a reading of *Monell* seems erroneous, however, because in that case this Court never referred to Rule 17(b) or the "capacity" of a defendant to be sued. Such an argument must be rejected because it seems virtually certain that, if this Supreme Court had intended in *Monell* to carve out an exception to one of the Federal Rules of Civil Procedure, the Court would have expressly announced such an holding. *See, Harris v. Nelson*, 394 U.S. 286, 298 (1969) (the Supreme Court has "no power to rewrite the Rules [of Civil Procedure] by judicial interpretations."); *see also, Canister Co. v. Leahy*, 182 F.2d 510, 514 (3rd Cir. 1950) (Federal Rules "must be adherred to."). In any event, even if this Court had made such a ruling, the plaintiffs in this case would not be able to come within its scope, inasmuch as the plaintiffs did *not* sue Carl Thomas "in his official capacity." On the contrary, the plaintiffs merely designated

the office which the defendant held at the time this action was instituted. Relief against a governmental entity should be denied when a plaintiff, through his designation of the parties defendant, gives no clue that he seeks recovery from the entity itself. Moreover, again assuming *arguendo* that the *Monell* Court did make such an implied holding, such a rule would not apply to this case because here "Eleventh Amendment considerations *do* . . . control analysis."

D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983.

Relief against a governmental entity must also be denied when a plaintiff gives no indication in his pleadings that he seeks recovery from the entity. In the instant case, the plaintiffs failed to plead or prove that the actions of Sheriff Thomas were taken in execution of official Dallas County policy or custom, or that Sheriff Thomas' acts could "fairly be said to represent" the official policy of the county, as required by *Monell* to establish liability against an entity. Given this failure, Dallas County has had no opportunity to assert any defenses to the plaintiffs' tardy claim upon it; therefore, no relief can be given the plaintiffs against Dallas County because there is no pleading on file connecting any conduct of Dallas County to the plaintiffs' damages. *Hoover v. U.S.*, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960; 5 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1234 (1969).

Moreover, the fact that the plaintiffs were represented by counsel in this case, as opposed to proceeding *pro se*,

is also significant in viewing the defective pleadings. It has been held:

> [I]t is well established . . . that civil rights complaints, especially those drafted by experienced counsel, must set forth with specificity the acts of *each* defendant that are alleged to have violated the plaintiff's civil rights.

Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979) (emphasis added); *accord, Roach v. Kligman*, 412 F.Supp. 521 (E.D. Pa. 1976); *Gozdanovic v. Civil Service Commission*, 361 F.Supp. 504 (W.D. Pa. 1973); *c.f., Koch v. Yunich*, 533 F.2d 80 (2nd Cir. 1976) (held that complaint based on civil rights statutes must contain specific allegation of facts showing deprivation of civil rights). Indeed, where a plaintiff has chosen expressly to exclude a potential defendant in a civil rights action, that party cannot be said to be a party defendant. *Gozdanovic v. Civil Service Commission, supra.* This rule is nothing more than a logical extension of the well-established principle, laid down by this Court twenty-four years ago, that the Federal Rules of Civil Procedure require a plaintiff to plead " 'a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The plaintiffs' failure to plead and prove that Sheriff Thomas' challenged actions were taken in execution of an official policy or custom of Dallas County or that he possessed sufficient authority so that his acts alone could represent such official policy is critical in reviewing the propriety of an award of attorneys' fees against the county. No one may be ordered to pay attorneys' fees under 42 U.S.C. § 1988 unless the conduct of such person or entity would

subject them to liability directly under one of the statutes specifically enumerated in § 1988. 42 U.S.C. § 1988 (1970). In referring to the Civil Rights Attorneys' Fee Award Act of 1976 (codified as 42 U.S.C. § 1988), this Court recognized this principle when it held that the Act "allows prevailing parties (in the discretion of the Court) in § 1983 suits to obtain attorneys' fees *from the losing parties.*" *Monell v. Department of Social Services, supra,* at 698-99 (emphasis added). Yet, although the plaintiffs pled and proved a § 1983 claim against Carl Thomas, the county cannot be held vicariously liable under § 1983 on a theory of *respondeat superior* on the basis of this pleading and evidence. *Id.* Inasmuch as the plaintiffs' pleadings and proof failed to give Dallas County *any* notice of the plaintiffs' claim against it, the Fifth Circuit erred as a matter of law when it held that the District Court abused its discretion by refusing to impose an award of attorneys' fees running against the entity itself. *Conley v. Gibson, supra.*

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF.

A. TEXAS SHERIFFS ARE STATE OFFICERS.

For more than eighty years, Texas law has held Sheriffs to be officers of the State itself, and not county officers. *Clarke v. Finley,* 93 Tex. 171, 54 S.W. 343 (1899). The office is created by the State Constitution. TEX CONST. Art. V, § 23. The office cannot be modified or abolished by the will of the local electorate in any individual county, save by statewide referendum. *c.f., Moncrief v. Gurley,* 609 S.W.2d 863, 866 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd. n.r.e.) (Massey, C.J., concurring). The duties and powers of the office are all specifically established by state statutes and not by local county ordinances. TEX. REV. CIV.

STAT. ANN. arts. 6865 — 6877-4 (Vernon 1960 and Vernon Supp. 1980-81); *see generally* TEX. CRIM. PRO. CODE ANN. Indeed, a state statute, not any local ordinance, requires a Sheriff to post a bond conditioned on his performance of official duties and good behavior, and this bond is payable to the Governor of Texas, not to any locally elected official. TEX. REV. CIV. STAT. ANN. art. 6866 (Vernon 1960).

Nor is the Sheriff's status as a state officer unique among county-level officers in Texas. Other such officers have long been recognized as state officers as well. *See, e.g., Fears v. Nacogdoches County*, 71 Tex. 337, 9 S.W. 265, 266 (1888) (Justice of the Peace "though sometimes called a county or precinct officer, . . . is an officer of the State, and not for the County."); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 25 (1896) (County Treasurer); *accord, Connor v. Zackry*, 117 S.W. 117 (Tex. Civ. App. 1909); *see generally, Ex Parte Preston*, 72 Tex. Crim. 77, 161 S.W. 115 (1913); 15 TEX. JUR. 2d, *Counties* § 49 (1960 and 1981 Supp.). The status of a Texas Sheriff as a State officer has already been acknowledged by the federal judiciary. *Doe v. Sullivan, supra.*

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY.

1. *Monell* Rule Does Not Apply to Local Governments Which Are Mere "Arms of the State."

Nowhere is the official policy of the State of Texas more clearly expressed than in the general statutes enacted by the Texas Legislature. Article 6869, Texas Revised Civil Statutes, vests virtually unbridled discretion in every Sheriff to employ and discharge deputies at "the pleasure of the

Sheriff." It must be said, therefore, that the official policy of the State of Texas is to give almost total authority over personnel decisions concerning county deputy sheriffs to the Sheriff elected in that county.

Monell, of course, established that a local government *not entitled to claim Eleventh Amendment immunity* can be held liable *only* where one of its officers, employees or agents deprives an individual of his federal rights, while executing an official policy or custom *of the local government itself*, or where the impermissible conduct is that of someone whose acts may fairly be said to represent the official policy or custom *of the local government. Monell v. Department of Social Services, supra.*

It is submitted that, under this rule, Dallas County cannot be held liable for the conduct of Sheriff Carl Thomas for two reasons. First, Dallas County is but an arm of the State of Texas and is, therefore, entitled to Eleventh Amendment immunity. *Doe v. Sullivan, supra.; c.f., Rodriguez v. Medical Arts Hospital*, 437 F.2d 1203, 1204 (5th Cir. 1971) (held that "in Texas, counties are political subdivisions of the State operating solely and exclusively as a governmental agency" of the State); *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948) (counties have no powers other than those expressly conferred on them by Texas Constitution and statutes); *Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000 (1941) (Texas county is but "mere" division of the State and can only perform governmental functions); *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919 (1925) (held that State of Texas actually owns all property in possession of counties, and Legislature "may exercise dominion and control over it without the consent of the county and without compensating the county for it");

see also, Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966); *vacated on other grounds*, 390 U.S. 474 (1968). Accordingly, the rule of liability announced in *Monell* expressly does not apply to Dallas County. *Monell v. Department of Social Services, supra*, n.54 at 690.

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County.

The second reason Dallas County cannot be held liable under § 1983 for the conduct of Sheriff Thomas in the instant case is that his conduct as a state officer in no manner executed the official policy or custom of Dallas County. Even if the Sheriff acted improperly in making personnel decisions with regard to the plaintiffs, such conduct was taken pursuant to the official policy of the State of Texas, which was to give the Sheriff the widest possible authority in personnel matters. *See, Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). Therefore, because the county could not have prevented Sheriff Thomas' actions, taken under the authority of Article 6869, Texas Revised Civil Statutes, "the citizens of . . . [Dallas] county should not bear singular responsibility" for his conduct. *Id.* at 404. Indeed, if any governmental entity should be called upon to bear responsibility Sheriff Thomas' acts, it should be the entire State of Texas, whose unbridled grant of statutory power to Sheriff Thomas may fairly be said to have "caused" any damages the plaintiffs may have suffered, inasmuch as Article 6869 permitted Carl Thomas to take the actions he did. Indeed, as this Supreme Court has held, "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owens v. City of Independence, Mo.*, 445 U.S. 622, 654 (1980). The converse of this principle is, of

course, that elemental notions of fairness require that a party whose conduct causes no damage should not be called upon to bear any loss. It is respectfully submitted that Dallas County caused no injuries to the Plaintiffs in this case.

The distinction between liability being imposed on an official under § 1983 and liability being imposed on his governmental entity as the result of his conduct has been recognized by numerous courts since *Monell*. For example, in *Familias Unidas v. Briscoe, supra.*, a Texas county judge had exercised his power under § 4.28 of the Texas Education Code, which vested in county judges the authority to require any organization deemed to be interfering with public school operations to disclose its membership. Although the Fifth Circuit struck down the statute as being unconstitutional, the Court held that the judge's conduct did not "represent the official policy of Medina County" because he was executing State policy. *Id.* at 404.

The distinction was again recognized by the Fifth Circuit in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). In *Rheuark*, three criminal defendants who had been convicted in state district court in Dallas County and who were incarcerated pending appeal brought a § 1983 action against the county, its commissioners, the state district judge who had presided over their trials and the court reporter who had reported the trial. The plaintiffs alleged that they were being denied their liberty because of lengthy delays in the transcription of their trials. The delays were caused by a shortage of court reporters, and the county commissioners had written the district judges in the county requesting them to curtail the appointment of additional reporters, even though the commissioners were aware of lengthy delays. Texas law requires a county to pay the court reporters'

salaries, but state district judges have independent power to appoint such reporters as are necessary and to set their salaries. The Fifth Circuit concluded that, notwithstanding the commissioners' action, the defendant state district judge was the party chiefly responsible for the plaintiffs' plight, since he had not appointed additional reporters. The Court, therefore, concluded that Dallas County, which had no authority over the district judge's appointments, was not liable.

The distinction was also recognized in *Wiesenfeld v. New York*, 474 F.Supp. 1141 (S.D. N.Y. 1979). In *Wiesenfeld*, the plaintiffs' complaint arose because their husband and father had been ordered to increase his weekly child support payments in favor of a child by his first wife by a State Family Court of the State of New York in a proceeding of which the plaintiffs had not been given notice. The plaintiffs contended that this judicial order would cause them to suffer direct financial and economic hardship. The plaintiffs sued the State of New York, the trial judges involved in the issuance and enforcement of the support orders and the City of New York, whose mayor had appointed the defendant judges of the state courts pursuant to New York State law. The District Court detailed how the actions of the defendant judges had been taken pursuant to their authority under State law and dismissed the claim against the City, noting that its only nexus with the plaintiffs was the fact that its mayor had merely appointed the State officials whose complained of acts were taken pursuant to state law. To find the City liable under these circumstances, the Court held, would be a finding of liability solely on the basis of *respondeat superior*, which was proscribed by *Monell*.

Clearly, the instant case is no different than *Familias Unidas*, *Rheuark* and *Wiesenfeld* with respect to the absence

of any liability on the part of the local government under § 1983. Even though the voters of the local county had elected the county judge in *Familias Unidas* and the district judge in *Rheuark* and even though the voters of the City of New York had elected the City's mayor, who in turn appointed the state trial judges in *Wiesenfeld*, none of the local entities were held liable for any wrongful conduct in these cases. The reason for these holdings is that the officials whose acts were challenged had simply been executing state laws and policies at the time their questioned conduct occurred. This is precisely the situation in the case at bar. To impose liability on Dallas County in the instant case is to establish liability simply because the county employed a tortfeasor. Such liability cannot be imposed. *Monell v. Department of Social Services, supra.*

CONCLUSION

Amicus curiae prays that the Judgment of the Court of Appeals imposing liability upon Dallas County under 42 U.S.C. §§ 1983 and 1988 be reversed.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned Notary Public in and for Tarrant County, Texas, on this day personally appeared JEFF. R. BOGGESS, who, being by me duly sworn, upon oath stated:

I, JEFF R. BOGGESS, on the ..... day of December, 1981, in compliance with Rule 28(3) and (5), Rules of the Supreme Court of the United States, served copies of the foregoing Motion for Leave to File Brief of Amicus Curiae, County Judges and Commissioners Associated of Texas, and Brief, on Petitioners, Dallas County, et al., by depositing the same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

EARL LUNA, ESQ.
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on Petitioner Carl Thomas by depositing same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

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Assistant District Attorney
Dallas County Courthouse
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on Respondent, Benny B. Barrett, by depositing same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the Courts below, at the address indicated, to-wit:

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JEFF R. BOGGESS

SUBSCRIBED AND SWORN TO ME before me by the said JEFF R. BOGGESS on this the ..... day of December, 1981.

Notary Public, Tarrant County
Texas

Amicus Brief

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No. 81-989

In The

Supreme Court of the United States

OCTOBER TERM, 1981

DALLAS COUNTY, TEXAS, ET AL.,

Petitioners,

v.

CARL THOMAS,

Petitioner,

v.

BENNY B. BARRETT,

Respondent.

BRIEF OF AMICUS CURIAE, TARRANT COUNTY, TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No. 81-989

In The

Supreme Court of the United States

OCTOBER TERM, 1981

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

CARL THOMAS,
Petitioner,

v.

BENNY B. BARRETT,
Respondent.

BRIEF OF AMICUS CURIAE, TARRANT COUNTY, TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, TARRANT COUNTY, TEXAS, an agency and political subdivision of the State of Texas (hereinafter referred to as "*Amicus Curiae*"), and files this, its Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari, and would respectfully show as follows:

INTEREST OF AMICUS CURIAE

Amicus curiae is an agency (i.e., county) of the State of Texas, as is one of the Petitioners in this cause, Dallas County, Texas. *Amicus* was one of several *amici* that appeared before the United States Court of Appeals for the Fifth Circuit in the recently decided case of *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc) and there presented many of the same arguments that it makes today before this Court. The interest of *amicus* is simply the desire that its txapayers not be held responsible in any fashion for the conduct of a state officer over whom neither the county nor its residents have any control.

This Brief demonstrates that the law already recognizes the legal principles behind this interest. While not directly adopting the statement of issues made by Petitioners, Dallas County, et al., this Brief supports the principles embraced by Petitioners' Issues Nos. II and IV. Petitioners' Brief for Certiorari at i.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case presented by Petitioners, Dallas County, et al., in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

I.

Under Federal Law, Carl Thomas' and Dallas County's Capacity To Be Sued Is Determined by Texas Law. Rule 17(b), Federal Rules of Civil Procedure, states that whether an individual defendant may be sued in a particular capacity shall be determined by the law of his domicile. This same Rule provides that the capacity of a governmental entity to be sued shall be determined by the law of the State in

which the District Court sits. Since Sheriff Carl Thomas is a Texas domiciliary, and Dallas County is a division of the State of Texas, Texas law governs the issue of the defendant's capacity to be sued in this action.

Under Texas law, Carl Thomas Is Incapable of Serving as a Surrogate Defendant for Dallas County. The Fifth Circuit treated this action against "Carl Thomas, Sheriff" as one against Dallas County itself. The Texas Rules of Civil Procedure, adopted in this instance as surrogate federal law by the Federal Rules of Civil Procedure, prescribe that a suit against a Texas County must be brought directly against the county in its own name. A county-level officer in Texas is thus incapable of serving as the alter ego of his county in litigation brought against the county's interests.

Under Federal Law, the Plaintiffs' Pleadings Fail To State a Claim Against Dallas County. The Federal Rules of Civil Procedure require plaintiffs to plead "a short and plain statement" of their claim sufficient to give the defendant "fair notice" of what the plaintiffs' claim is and the grounds upon which it rests. The plaintiffs in the instant case failed to comply with this requirement with respect to Dallas County. There was absolutely no pleading whatever linking Dallas County, as distinguished from Carl Thomas, to any ground of liability to the plaintiffs.

II.

Texas Sheriffs Are State, Not County, Officers. Well established Texas law holds squarely that a County Sheriff is not an officer of a county, but of the State of Texas itself. As an independently elected officer, all of his duties, powers and authority emanate from State, not local, law.

Texas Counties Are But Arms of the State and Do Not Come Within the Scope of § 1983 Liability of Local Governments As Defined in *Monell*. State law flatly holds Texas counties to be but mere local administrative units of the State of Texas. This principle has been recognized by federal courts and has already been used to grant Eleventh Amendment immunity status to these units of government. The scope of § 1983 liability for municipalities announted by this Court in *Monell v. Department of Social Services*, by its own express limitations, therefore does not apply to Texas counties.

If Any Government Is Responsible to the Plaintiffs, It Should Be the Entire State of Texas, Not Dallas County. The official policy of the State of Texas allowed Carl Thomas to make the personnel decisions challenged in the case at bar. Dallas County had absolutely no control over Sheriff Thomas' actions. Federal decisions, including authority decided by this Court, hold that Dallas County should not bear responsibility under these circumstances and that, if any governmental entity should be held accountable to the plaintiffs for Carl Thomas' conduct, it should be the entire State of Texas.

ARGUMENT

I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT.

A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY

AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW.

Without reference to the Federal Rules of Civil Procedure, the Fifth Circuit in this case held for the first time that where a county-level officer of a Texas county is named as a party defendant, a judgment against that defendant may be satisfied with funds possessed by the county even though it was not named a defendant in the action. Thus, the Court of Appeals impliedly held that a county-level officer has the capacity to act as a surrogate litigant on behalf of his county and/or that a Texas county has the capacity to be sued through one of its officers. The Court necessarily made this implied holding on the issue of capacity, since "[g]enerally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and, typically, is determined without regard to the particular claim or defense being asserted." 6 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1559, at 727-28 (1971). In the case at bar, the Fifth Circuit implicitly determined that Sheriff Carl Thomas possessed sufficient "personal qualifications" "to litigate" on behalf of Dallas County, as well as himself.

This determination was simply wrong. Rule 17(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the District Court is held . . .

FED. R. CIV. P. 17(b). Applying this rule to the instant case, one need look only to Texas law, since Texas is both the domicile of Sheriff Thomas and the State in which the District Court sat. State law must determine whether a governmental officer within that state has the capacity to serve as a surrogate litigant for his governmental entity in a federal court action. *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) (per Rives, Circuit Judge). Moreover Rule 17(b) has been employed routinely to resolve issues of capacity in civil rights actions by adoption of applicable state law. *See, e.g., Lombardi v. Peace*, 259 F.Supp. 222 (S.D. N.Y. 1966).

B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT.

When one looks to Texas law to determine whether an action may be maintained against a county through a lawsuit filed against one or more county-level officers, the answer is clear. Rule 33 of the Texas Rules of Civil Procedure flatly states, "Suits by or against a county or incorporated city, town or village shall be in its corporate name." TEX. R. CIV. P. 33. This rule of Texas procedure is firmly embedded and has been invoked repeatedly by Texas Courts to deny plaintiffs relief against a county where the suit was maintained only against county-level officers. *See, e.g., Scott v. Graham*, 156 Tex. 97, 292 S.W.2d 324 (1956); *Childress County v. Sachse*, 310 S.W.2d 414 (Tex. Civ. App. — Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371,312 S.W.2d 380); *Davis v. Wildenthal*, 241 S.W.2d 620 (Tex. Civ. App. — El Paso 1951, writ ref'd. n.r.e.). Accordingly, the Court of Appeals erred when it overlooked Federal Rule 17(b) and

Texas Rule 33 and reversed the District Court's denial of an award of attorneys' fees against Dallas County.[1]

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[1] Although *amicus* notes that this Court has previously held that a governmental entity entitled to claim Eleventh Amendment immunity may not be sued directly in its own name in federal court, *see, e.g., Quern v. Jordan*, 440 U.S. 332 (1979); and *Alabama v. Pugh*, 438 U.S. 781 (1978), *amicus* submits that Rule 33 of the Texas Rules of Civil Procedure does not indicate that Texas counties are not entitled to this constitutional defense or that the State of Texas has consented to suits against its counties in federal court, thereby waiving the Eleventh Amendment defense.

Amicus submits that, under the criteria established by this Court and lower federal courts, Texas counties may properly claim Eleventh Amendment protection. *See Doe v. Sullivan*, 472 F.Supp. 975 (W.D. Tex. 1979); *compare, Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Fifth Circuit itself has indicated that such protection may indeed be appropriate. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981 (en banc).

Rule 33, requiring suits against Texas counties to be brought against the governmental body itself, is a procedural rule promulgated for use in Texas courts by the Texas Supreme Court. A *procedural* rule fashioned by a court for use in state courts should not be deemed as a waiver of a *substantive* defense available in federal court. Indeed, Rule 17(b) is a procedural rule and cannot be construed, even by its adoption of a state procedural rule, to effect, abridge or modify the substantive rights of Dallas County under the Eleventh Amendment. *John R. Alley & Co., Inc. v. Federal National Bank*, 124 F.2d 995 (10th Cir. 1942). But even if Rule 17(b) could be construed as permitting an interpretation that Rule 33 of the Texas Rules had impliedly waived a county's Eleventh Amendment protection, it must be remembered that implied waivers of Eleventh Amendment protection are not favored. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *see also* cases cited in 13 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3524 at 79, n. 14 (1975). Of course, the applicability of this constitutional defense is not directly before the Court in the instant case, inasmuch as Dallas County, in a proper case, could be held liable for payment of a prevailing plaintiff's attorneys' fees, notwithstanding the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678 (1978).

Amicus respectfully submits that a remand of this case to the Court of Appeals to decide these interrelated issues of capacity and

C. MONELL AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE.

It might be contended that this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), impliedly held that Rule 17(b) does not apply in civil rights actions against government officers who are named as defendants "in their official capacities." It could be argued that, in *Monell*, where there were individual defendants who had been sued in their "official capacities," the Court impliedly held that a government officer, when sued in such a capacity, *always* has the "*capacity*" to represent the interests of his government as a surrogate litigant, "at least where Eleventh Amendment considerations do not control analysis." *Monell v. Department of Social Services, supra*, at 690, n. 55.

Such a reading of *Monell* seems erroneous, however, because in that case this Court never referred to Rule 17(b) or the "capacity" of a defendant to be sued. Such an argument must be rejected because it seems virtually certain that, if this Supreme Court had intended in *Monell* to carve out an exception to one of the Federal Rules of Civil Procedure, the Court would have expressly announced such an holding. *See, Harris v. Nelson*, 394 U.S. 286, 298 (1969) (the Supreme Court has "no power to rewrite the Rules [of Civil Procedure] by judicial interpretations."); *see also*,

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constitutional immunity may be desirable so that this Court can have the benefit of the Fifth Circuit's views on these issues, which are necessarily dependent upon the intricacies of Texas law. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535 (1978); *Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970); *Aetna Casualty & Surety Company v. Flowers*, 330 U.S. 464, 468 (1947); *United States v. Ballard*, 322 U.S. 78, 88 (1944).

Canister Co. v. Leahy, 182 F.2d 510, 514 (3rd Cir. 1950) (Federal Rules "must be adherred to."). In any event, even if this Court had made such a ruling, the plaintiffs in this case would not be able to come within its scope, inasmuch as the plaintiffs did *not* sue Carl Thomas "in his official capacity." On the contrary, the plaintiffs merely designated the office which the defendant held at the time this action was instituted. Relief against a governmental entity should be denied when a plaintiff, through his designation of the parties defendant, gives no clue that he seeks recovery from the entity itself. Moreover, again assuming *arguendo* that the *Monell* Court did make such an implied holding, such a rule would not apply to this case because here "Eleventh Amendment considerations *do* . . . control analysis."

D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983.

Relief against a governmental entity must also be denied when a plaintiff gives no indication in his pleadings that he seeks recovery from the entity. In the instant case, the plaintiffs failed to plead or prove that the actions of Sheriff Thomas were taken in execution of official Dallas County policy or custom, or that Sheriff Thomas' acts could "fairly be said to represent" the official policy of the county, as required by *Monell* to establish liability against an entity. Given this failure, Dallas County has had no opportunity to assert any defenses to the plaintiffs' tardy claim upon it; therefore, no relief can be given the plaintiffs against Dallas County because there is no pleading on file connecting any conduct of Dallas County to the plaintiffs'

damages. *Hoover v. U.S.*, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960; 5 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1234 (1969).

Moreover, the fact that the plaintiffs were represented by counsel in this case, as opposed to proceeding *pro se*, is also significant in viewing the defective pleadings. It has been held:

> [I]t is well established . . . that civil rights complaints, especially those drafted by experienced counsel, must set forth with specificity the acts of *each* defendant that are alleged to have violated the plaintiff's civil rights.

Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979) (emphasis added); *accord*, *Roach v. Kligman*, 412 F.Supp. 521 (E.D. Pa. 1976); *Gozdanovic v. Civil Service Commission*, 361 F.Supp. 504 (W.D. Pa. 1973); *c.f.*, *Koch v. Yunich*, 533 F.2d 80 (2nd Cir. 1976) (held that complaint based on civil rights statutes must contain specific allegation of facts showing deprivation of civil rights). Indeed, where a plaintiff has chosen expressly to exclude a potential defendant in a civil rights action, that party cannot be said to be a party defendant. *Gozdanovic v. Civil Service Commission, supra.* This rule is nothing more than a logical extension of the well established principle, laid down by this Court twenty-four years ago, that the Federal Rules of Civil Procedure require a plaintiff to plead "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The plaintiffs' failure to plead and prove that Sheriff Thomas' challenged actions were taken in execution of

an official policy or custom of Dallas County or that he possessed sufficient authority so that this acts alone could represent such official policy is critical in reviewing the propriety of an award of attorneys' fees against the county. No one may be ordered to pay attorneys' fees under 42 U.S.C. § 1988 unless the conduct of such person or entity would subject them to liability directly under one of the statutes specifically enumerated in § 1988. 42 U.S.C. § 1988 (1970). In referring to the Civil Rights Attorney's Fee Award Act of 1976 (codified as 42 U.S.C. § 1988), this Court recognized this principle when it held that the Act "allows prevailing parties (in the discretion of the Court) in § 1983 suits to obtain attorneys' fees *from the losing parties.*" *Monell v. Department of Social Services, supra,* at 698-99 (emphasis added). Yet, although the plaintiffs pled and proved a § 1983 claim against Carl Thomas, the county cannot be held vicariously liable under § 1983 on a theory of *respondeat superior* on the basis of this pleading and evidence. *Id.* Inasmuch as the plaintiffs' pleadings and proof failed to give Dallas County *any* notice of the plaintiffs' claim against it, the Fifth Circuit erred as a matter of law when it held that the District Court abused its discretion by refusing to impose an award of atorneys' fees running against the entity itself. *Conley v. Gibson, supra.*

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF.

A. TEXAS SHERIFFS ARE STATE OFFICERS.

For more than eighty years, Texas law has held Sheriffs to be officers of the State itself, and not county officers. *Clarke v. Finley,* 93 Tex. 171, 54 S.W. 343 (1899). The office is created by the State Constitution. TEX. CONST.

Art. V, § 23. The office cannot be modified or abolished by the will of the local electorate in any individual county, save by statewide referendum. c.f., *Moncrief v. Gurley*, 609 S.W.2d 863, 866 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd. n.r.e.) (Massey, C.J., concurring). The duties and powers of the office are all specifically established by state statutes and not by local county ordinances. TEX. REV. CIV. ANN. arts. 6865 — 6877-4 (Vernon 1960 and Vernon Supp. 1980-81); *see generally* TEX. CRIM. PRO. CODE ANN. Indeed, a state statute, not any local ordinance, requires a Sheriff to post a bond conditioned on his performance of official duties and good behavior, and this bond is payable to the Governor of Texas, not to any locally elected official. TEX. REV. CIV. STAT. ANN. art. 6866 (Vernon 1960).

Nor is the Sheriff's status as a state officer unique among county-level officers in Texas. Other such officers have long been recognized as state officers as well. *See, e.g., Fears v. Nacogdoches County*, 71 Tex. 337, 9 S.W. 265, 266 (1888) (Justice of the Peace "though sometimes called a county or precinct officer, ... is an officer of the State, and not for the County."); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 25 (1896) (County Treasurer); *accord, Connor v. Zackry*, 117 S.W. 117 (Tex. Civ. App. 1909); *see generally, Ex Parte Preston*, 72 Tex. Crim. 77, 161 S.W. 115 (1913); 15 TEX. JUR. 2d, *Counties* § 49 (1960 and 1981 Supp.). The status of a Texas Sheriff as a State officer has already been acknowledged by the federal judiciary. *Doe v. Sullivan, supra.*

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY.

1. *Monell* Rule Does Not Apply to Local Governments Which Are Mere "Arms of the State."

Nowhere is the official policy of the State of Texas more clearly expressed than in the general statutes enacted by the Texas Legislature. Article 6869, Texas Revised Civil Statutes, vests virtually unbridled discretion in every Sheriff to employ and discharge deputies at "the pleasure of the Sheriff." It must be said, therefore, that the official policy of the State of Texas is to give almost total authority over personnel decisions concerning county deputy sheriffs to the Sheriff elected in that county.

Monell, of course, established that a local government *not entitled to claim Eleventh Amendment immunity* can be liable *only* where one of its officers, employees or agents deprives an individual of his federal rights, while executing an official policy or custom *of the local government itself*, or where the impermissible conduct is that of someone whose acts may fairly be said to represent the official policy or custom *of the local government. Monell v. Department of Social Services, supra.*

It is submitted that, under this rule, Dallas County cannot be held liable for the conduct of Sheriff Carl Thomas for two reasons. First, Dallas County is but an arm of the State of Texas and is, therefore, entitled to Eleventh Amendment immunity. *Doe v. Sullivan, supra,; c.f.,Rodriguez v. Medical Arts Hospital*, 437 F.2d 1203, 1204 (5th Cir. 1971) (held that "in Texas, counties are political subdivisions of the State operating solely and exclusively as a governmental agency" of the State); *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948) (counties have no powers other than those expressly conferred on them by Texas Constitution and statutes); *Miller v. El Paso*

County, 136 Tex. 370, 150 S.W.2d 1000 (1941) (Texas county is but "mere" division of the State and can only perform governmental functions); *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919 (1925) (held that State of Texas actually owns all property in possession of counties, and Legislature "may exercise dominion and control over it without the consent of the county and without compensating the county for it"); *see also, Avery v. Midland County*, 406 S.W.2d 422 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968). Accordingly, the rule of liability announced in *Monell* expressly does not apply to Dallas County. *Monell v. Department of Social Services, supra*, n.54 at 690.

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County.

The second reason Dallas County cannot be held liable under § 1983 for the conduct of Sheriff Thomas in the instant case is that his conduct as a state officer in no manner executed the official policy or custom of Dallas County. Even if the Sheriff acted improperly in making personnel decisions with regard to the plaintiffs, such conduct was taken pursuant to the official policy of the State of Texas, which was to give the Sheriff the widest possible authority in personnel matters. *See, Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). Therefore, because the county could not have prevented Sheriff Thomas' actions, taken under the authority of Article 6869, Texas Revised Civil Statutes, "the citizens of... [Dallas] county should not bear singular responsibility" for his conduct. *Id.* at 404. Inded, if any governmental entity should be called upon to bear responsibility for Sheriff Thomas' acts, it should be the entire State of Texas, whose unbridled grant of stat-

utory power to Sheriff Thomas may fairly be said to have "caused" any damages the plaintiffs may have suffered, inasmuch as Article 6869 permitted Carl Thomas to take the actions he did. Indeed, as this Supreme Court has held, "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owens v. City of Independence Mo.*, 445 U.S. 622, 654 (1980). The converse of this principle is, of course, that elemental notions of fairness require that a party whose conduct causes no damage should not be called upon to bear any loss. It is respectfully submitted that Dallas County caused no injuries to the Plaintiffs in this case.

The distinction between liability being imposed on an official under § 1983 and liability being imposed on his governmental entity as the result of his conduct has been recognized by numerous courts since *Monell*. For example, in *Familias Unidas v. Briscoe, supra.*, a Texas county judge had exercised his power under § 4.28 of the Texas Education Code, which vested in county judges the authority to require any organization deemed to to be interferring with public school operations to disclose its membership. Although the Fifth Circuit struck down the statute as being unconstitutional, the Court held that the judge's conduct did not "represent the official policy of Medina County" because he was executing State policy. *Id.* at 404.

The distinction was again recognized by the Fifth Circuit in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). In *Rheuark*, three criminal defendants who had been convicted in state district court in Dallas County and who were incarcerated pending appeal brought a § 1983 action against the county, its commissioners, the state district judge who had presided over their trials and the court reporter who

had reported the trial. The plaintiffs alleged that they were being denied their liberty because of lengthy delays in the transcription of their trials. The delays were caused by a shortage of court reporters, and the county commissioners had written the district judges in the county requesting them to curtail the appointment of additional reporters, even though the commissioners were aware of lengthy delays. Texas law requires a county to pay the court reporters' salaries, but state district judges have independent power to appoint such reporters as are necessary and to set their salaries. The Fifth Circuit concluded that, notwithstanding the commissioners' action, the defendant state district judge was the party chiefly responsible for the plaintiffs' plight, since he had not appointed additional reporters. The Court, therefore, concluded that Dallas County, which had no authority over the district judge's appointments, was not liable.

The distinction was also recognized in *Wiesenfeld v. New York*, 474 F.Supp. 1141 (S.D. N.Y. 1979). In *Wiesenfeld*, the plaintiffs' complaint arose because their husband and father had been ordered to increase his weekly child support payments in favor of a child by his first wife by a State Family Court of the State of New York in a proceeding of which the plaintiffs had not been given notice. The plaintiffs contended that this judicial order would cause them to suffer direct financial and economic hardship. The plaintiffs sued the State of New York, the trial judges involved in the issuance and enforcement of the support orders and the City of New York, whose mayor had appointed the defendant judges of the state courts pursuant to New York State law. The District Court detailed how the actions of the defendant judges had been taken pursuant to their authority under State law and dismissed the

claim against the City, noting that its only nexus with the plaintiffs was the fact that its mayor had merely appointed the State officials whose complained of acts were taken pursuant to state law. To find the City liable under these circumstances, the Court held, would be a finding of liability solely on the basis of *respondeat superior*, which was proscribed by *Monell.*

Clearly, the instant case is no different than *Familias Unidas, Rheuark and Wiesenfeld* with respect to the absence of any liability on the part of the local government under § 1983. Even though the voters of the local county had elected the county judge in *Familias Unidas* and the district judge in *Rheuark* and even though the voters of the City of New York had elected the City's mayor, who in turn appointed the state trial judges in *Wiesenfeld,* none of the local entities were held liable for any wrongful conduct in these cases. The reason for these holdings is that the officials whose acts were challenged had simply been executing state laws and policies at the time their questioned conduct occurred. This is precisely the situation in the case at bar. To impose liability on Dallas County in the instant case is to establish liability simply because the county employed a tortfeasor. Such liability cannot be imposed. *Monell v. Department of Social Services, supra.*

CONCLUSION

Amicus curiae prays that the Judgment of the Court of Appeals imposing liability upon Dallas County under 42 U.S.C. §§ 1983 and 1988 be reversed.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned Notary Public in and for Tarrant County, Texas, on this day personally appeared TIM CURRY, who, being by me duly sworn, upon oath stated:

I, TIM CURRY, am a member of Bar of the Supreme Court of the United States and, contemporaneously with the filing of this Brief of Amicus Curiae, Tarrant County, Texas, have tendered an Entry of Appearance to the Court.

I further state upon oath that, on the day of of December, 1981, in compliance with Rule 28(3) and (5), Rules of the Supreme Court of the United States, I served copies of the foregoing Brief of Amicus Curiae, Tarrant County, Texas, on Petitioners, Dallas County, et al., by depositing the same in the United States Mail, with first-class postage prepaid, adressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

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On Petitioner Carl Thomas by depositing same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

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TIM CURRY

SUBSCRIBED AND SWORN TO ME before me by the said TIM CURRY on this the day of December, 1981.

Notary Public, Tarrant
County, Texas